

BIENNIAL REPORT
OF THE
ATTORNEY GENERAL
TO THE
GOVERNOR OF THE STATE
OF ALABAMA



FOR THE PERIOD
FROM OCTOBER 1, 1936
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1939

ASSISTANT ATTORNEYS GENERAL

1934-1938

Beginning January 14, 1935

The following named lawyers have served at different times in the capacity of Assistant Attorneys General during the past four years. Some of them have served four years, others three years, others two years and still others shorter periods of time.

Thomas S. Lawson
Peyton D. Bibb
Jack Crenshaw
(Miss) Effie Crittenden
Silas C. Garrett III.
John J. Haynes
Walter J. Knabe
Francis M. Kohn
William H. Loeb
Frontis H. Moore
Charles L. Rowe
James L. Screws
Bowen W. Simmons
Clarence M. Small

LIST OF CIRCUIT JUDGES AND SOLICITORS

1934-1938

Beginning January 14, 1935

1st Circuit—Choctaw, Clarke and Washington Counties. Judge Oscar L. Gray, Butler (died January 2, 1936); Judge A. S. Johnson, Thomasville, appointed January 24, 1936; succeeded by Judge Joe M. Pelham, Jr., Chatom, on November 13, 1936; Solicitor F. E. Poole, Grove Hill.

2nd Circuit—Butler, Crenshaw and Lowndes Counties. Judge Arthur E. Gamble, Greenville; Solicitor H. P. Rogers, Greenville.

3rd Circuit—Barbour, Bullock, Dale and Russell Counties. Judge Judge S. Williams, Clayton; Solicitor George W. Andrews, Jr., Union Springs.

4th Circuit—Bibb, Dallas, Hale, Perry and Wilcox Counties. Judge John Miller, Camden; Solicitor Joseph H. James, Greensboro.

5th Circuit—Chambers, Lee, Macon, Randolph and Talapoosa Counties. Judge W. B. Bowling, Lafayette; Judge James W. Strother, Dadeville (died February 9, 1938); Judge Will O. Walton, Lafayette, appointed February 16, 1938; Solicitor John K. Watkins, Opelika.

6th Circuit—Tuscaloosa County. Judge Henry B. Foster, Tuscaloosa; Solicitor Gordon Davis, Tuscaloosa.

7th Circuit—Calhoun, Cleburne and Talladega Counties. Judge R. B. Carr, Anniston; Judge Lamar Field, Anniston; Solicitor J. B. Sanford, Talladega.

8th Circuit—Cullman, Lawrence, Limestone and Morgan Counties. Judge W. W. Callahan, Decatur; Judge A. A. Griffith, Cullman; Solicitor Melvin Hutson, Decatur.

9th Circuit—Cherokee, DeKalb, Jackson and Marshall Counties. Judge A. E. Hawkins, Fort Payne; Solicitor H. G. Bailey, Boaz.

10th Circuit—Jefferson County. Judge J. F. Thompson, Birmingham; Judge C. B. Smith, Birmingham; Judge Richard V. Evans, Birmingham; Judge John Denson, Birmingham; Judge J. Russell McElroy, Birmingham; Judge Gardner Goodwyn, Bessemer; Judge J. Edgar Bowron, Birmingham; Judge James Q. Smith, Birmingham; Judge E. M. Creel, Birmingham; Judge Leigh M. Clark, Birmingham; Judge Robert J. Wheeler, Birmingham; Solicitor George Lewis Bailes, Birmingham.

11th Circuit—Colbert, Franklin and Lauderdale Counties. Judge Chas. P. Almon, Florence; Solicitor R. T. Simpson, Jr., Florence.

12th Circuit—Coffee and Pike Counties. Judge W. L. Parks, Troy; Solicitor E. C. Orme, Troy.

13th Circuit—Mobile County. Judge Claude A. Grayson, Mobile; Judge Joel W. Goldsby, Mobile (died August 4, 1937); Judge J. Blocker Thornton, Mobile; Judge Francis J. Inge, Mobile, appointed October 20, 1937 (died March 18, 1938); Judge James H. Webb, Mobile, appointed March 31, 1938; Solicitor Bart B. Chamberlain, Mobile.

14th Circuit—Fayette, Lamar, Marion, Walker and Winston Counties. Judge Ernest Lacey, Jasper; Judge R. L. Blanton, Jasper; Solicitor Still Hunter, Jasper.

15th Circuit—Montgomery County. Judge Walter B. Jones, Montgomery; Judge Eugene W. Carter, Montgomery; Solicitor W. T. Seibels, Montgomery.

16th Circuit—Blount, Etowah and St. Clair Counties. Judge J. H. Disque, Jr., Gadsden; Judge Alto V. Lee, Gadsden; Solicitor M. C. Sivley, Gadsden.

17th Circuit—Greene, Marengo, Pickens and Sumter Counties. Judge Benjamin F. Elmore, Demopolis; Solicitor J. Fred Aldridge, Eutaw.

18th Circuit—Clay, Coosa and Shelby Counties. Judge W. W. Wallace, Columbiana; Solicitor A. L. Hardegree, Ashland.

19th Circuit—Autauga, Chilton and Elmore Counties. Judge Arthur Glover, Wetumpka; Solicitor Winston Huddleston, Wetumpka.

20th Circuit—Henry and Houston Counties. Judge D. C. Halstead, Headland; Solicitor J. Hubert Farmer, Dothan.

21st Circuit—Baldwin, Conecuh, Escambia and Monroe Counties. Judge F. W. Hare, Monroeville; Solicitor Ralph L. Jones, Monroeville.

22nd Circuit—Covington and Geneva Counties. Judge Robert S. Reid, Andalusia; Solicitor Frank J. Mizell, Jr., Florala.

23rd Circuit—Madison County. Judge Paul Speake, Huntsville (died December 6, 1937); Judge Schuyler H. Richardson, appointed December 10, 1937; Solicitor John E. McEachin, Huntsville.



Albert A. Carmichael was elected Attorney General in 1934 and assumed the duties of the office on January 14, 1935.

The duties of the Attorney General may be roughly divided into the following divisions: Civil division, criminal division, opinion division, boards division, and Securities Commission.

Under the civil division are all tax cases, all public utility cases, the settlement of examiners' reports of the audits of the records of all state and county officials, and the cases arising out of the same, and all other civil litigation in which the State of Alabama is interested.

Three of the most important civil cases handled by him as Attorney General are, (1) The Unemployment Compensation cases in which the constitutionality of both the state and federal statutes was upheld ultimately by both the Supreme Court of Alabama and the Supreme Court of the United States; (2) The case of the State of Alabama and the City of Birmingham against the Southern Bell Telephone & Telegraph Company before the Public Service Commission of Alabama, which resulted in a reduction in rates to telephone subscribers in Alabama amounting to a saving of \$250,000.00 annually; and (3) The case of State ex rel Wilkinson v. Murphy, in which the constitutionality of the Alabama Beverage Control Act is the issue. This latter case has only been heard in the Circuit Court of Jefferson County where the constitutionality of the Act was upheld and is to be heard in the Supreme Court of Alabama on appeal on December 21, 1938.

Under the criminal division come the duty of the general direction of all criminal prosecutions, including advising and directing the activities of the various circuit and county solicitors of the state in criminal matters, the investigation of criminal cases by the State, and the direction of the work of the State Toxicologist. Under this division also come the duty of handling all criminal cases appealed to both the Court of Appeals and the Supreme Court and the prosecution of all impeachment cases before the Supreme Court. During the period that he has been Attorney General his office has handled approximately two thousand criminal appeal cases in the two appellate courts and has prosecuted to a conclusion six impeachment cases in the Supreme Court.

Under the opinion division comes the duty of rendering official advice to all state and county officials in the State of Alabama. In the discharge of this duty his office has rendered approximately twenty-three hundred official opinions and has answered by informal letters and personal consultations a much larger number of requests for official advice.

Under the boards division come the Pardon Board, the Board of Compromise, the Board of Compromise of School Lands, the Pension Commission, the Building Commission, the Memorial Commission and the Highway Bond Commission, and the Board of Adjustment. He is a member of each except the last and he represents the State in all matters before that Board.

The Securities Commission was transferred from the Public Service Commission to the office of the Attorney General in 1935 and the Attorney General was made the Securities Commissioner. As such, he has general supervisory and regulatory powers over the sale of all forms of securities in Alabama.

Reports from certain of the Assistant Attorneys General follow immediately after this statement and a reading of them will show in a more detailed form the work done by this department during the last four years.

REPORT OF THOMAS S. LAWSON, FIRST ASSISTANT ATTORNEY GENERAL

Thomas S. Lawson was reappointed as an Assistant Attorney General on January 4, 1935, and has devoted practically his entire time to the discharge of his duties as such since that date.

In addition to the usual routine duties incident to the office, he was charged with the duty of passing upon and approving the opinions prepared by the other assistants in the office. This duty alone required a considerable part of his time.

He has prepared numerous opinions to various state and county officials throughout the past four years.

He has been performing for the Attorney General the duties imposed upon the Attorney General by the provisions of Act No. 102, approved March 29, 1933, General Acts, 1933, page 88. Section 35 of this act made the Attorney General ex officio Bond Commissioner of the State of Alabama and required of him as such to examine into and pass upon any of the bonds issued under the provisions of this act. The following municipalities presented bond ordinances to the Attorney General's office for approval: Alexander City (2), Aliceville, Andalusia (2), Anniston, Brewton, Butler, Calera, Carrollton, Cherokee, Childersburg, Clanton, Cordova, Courtland, Cullman, East Brewton, Frisco City, Fort Deposit, Grove Hill, Hackleburg, Hamilton, Jackson, Jacksonville, Leeds, Leighton, Lincoln, Madison, Millport, Muscle Shoals, Oakman, Ozark, Pell City, Pineapple, Sheffield, Troy, Union Springs, Vernon, Warrior, Wedowee, Wilton, Winfield. He passed on all of these matters for the Attorney General.

Since the creation of the Public Works Board of Alabama, he has been assigned to that Board and has prepared all resolutions and other proceedings incident to the performance of the duties of the members of the Public Works Board. In addition to such duties, he appeared for the Public Works Board in the case of Alabama Power Company v. City of Fort Payne and the members of the Public Works Board. There were presented to the said Board petitions by the following political subdivisions of the State of Alabama, which petitions were granted and the various subdivisions given the consent and authorization of the Public Works Board to issue revenue bonds:

Alexander City—Sewerage; Ashland—Sewerage; Baldwin County Electric Distribution System; Bessemer—Distribution System—Bessemer (Transmission Line); Butler County Electric Membership Corporation; Cherokee County Electric Distribution System; Cherokee County Electric Membership Corporation (2); City of Andalusia—Second Lien Gas Revenue Bonds; City of Decatur—Electric Distribution System; City of Hartselle—Electric Distribution System; City of Jacksonville—Sewerage; City of Mobile—Cold Storage Plant (2); City of Russellville—Electric Distribution; City of Troy—Second Lien Gas Revenue Bonds; City of Tuskegee—Water Supply System; Clark Washington Electric Membership Corporation (2); Clark Washington Electric Distribution System; County of Winston—Waterworks; Cullman County Electric Distribution System; Cullman County Electric Membership Corporation (2); Dixie Electric Membership Corporation; Grove Hill—Sewerage; Housing

Authority of Birmingham District; Jefferson County — hospital; Linden—Sewerage; Livingston—Sewerage; Mobile Docks—City of Mobile; Pea River Electric Membership Corporation; South Alabama Electric Membership Corporation; Southern Pine Electric Membership Corporation; Tarrant City—Electric Distribution System; Town of Centre—Waterworks; Town of Courtland—Electric Distribution System; Town of Fort Payne—Electric Distribution System; Town of Gordo—Sanitary Sewerage; Town of Muscle Shoals—Electric Energy Distribution System; Town of Pineapple—Waterworks; Town of Red Level—Waterworks; Town of Rogersville—Waterworks; Wiltonville—Waterworks.

All of the informations filed in the Supreme Court by this office in impeachment proceedings were prepared by Lawson, with the exception of the information filed against the Sheriff of Henry County. Informations were prepared by him against the Judge of the County Court of Walker County, Alabama; the Probate Judge of Jackson County, Alabama; the Sheriff of Macon County, Alabama; the Probate Judge of Cullman County, Alabama; the Probate Judge of Morgan County, Alabama. The Judge of Walker County and the Probate Judge of Jackson County both resigned from office prior to the dates on which their trials were set in the Supreme Court. The Probate Judge of Cullman County was acquitted by the Supreme Court. The Sheriff of Macon County and the Probate Judge of Morgan County were both convicted by the Supreme Court and removed from office.

Lawson represented the Attorney General in the trial of the cases commonly referred to as the Scottsboro cases, being associated in those trials with Hon. Melvin Hutson, Solicitor of the 8th Judicial Circuit of Alabama, and Hon. H. G. Bailey, Solicitor of the 9th Judicial Circuit of Alabama. The cases were argued in the Supreme Court of Alabama by Lawson and briefs were prepared by him. He prepared a brief in opposition to a petition for writ of certiorari to the Supreme Court of Alabama, filed in the Supreme Court of the United States. The Supreme Court of the United States denied this writ.

Lawson has appeared with several grand juries in various counties in the State, substituting for solicitors who were ill or because of some peculiar circumstance were compelled to rescue themselves.

Lawson has represented the Attorney General in the trial of various civil suits.

With few exceptions, the reports of examinations made of the books and records of the various county officials have been referred to Lawson for his attention. Approximately 400 reports of examinations have been assigned to him, many of which he has settled thereby collecting many thousands of dollars for the State and counties.

REPORT OF SILAS C. GARRETT III, ASSISTANT ATTORNEY GENERAL

Silas C. Garrett, III, was appointed an Assistant Attorney General on October 1, 1935, and has devoted his full time to the discharge of his duties as such since that date.

Simultaneous with his appointment the legislature of Alabama created the State Board of Adjustment for the purpose of hearing and passing upon claims against the State of Alabama, a matter which had previously been

handled by the legislature itself through the medium of individual relief bills. The Act creating the Board provided that the Attorney General should represent the State in all matters before the Board. Garrett was assigned to represent the office of the Attorney General in all these matters and has continued to act in this capacity. The work of the Board during the period from October 1, 1935, to October 1, 1938, in all of which he represented the Attorney General, is summarized as follows:

417 claims, including 76 relief bills that had been introduced at the 1935 session of the legislature, were filed. These claims asked for a total of \$710,120.92 from the State of Alabama or various agencies, departments, bureaus, boards, commissions or institutions thereof. Only 18 of these claims, asking a total of \$24,164.98, were pending on October 1, 1938. All other claims had been disposed of as follows:

Awards were made on 280 claims, totalling only \$145,114.04, and all others were dismissed or denied. It should be noted that the Board had at its disposal for the purpose of paying awards made by it during this period, the sum of \$300,000.00.

In several instances cases were filed in the Courts challenging the legal correctness of positions taken by the Attorney General before the Board, either by petitions for writ of mandamus against the members of the Board to compel them to take jurisdiction of claims which they had dismissed for lack of jurisdiction on motion of the Attorney General, or by petitions for a writ of mandamus against the Comptroller to compel him to issue warrants in payment of awards made by the Board on claims where the Attorney General had moved the Board to dismiss them for lack of jurisdiction. In all of these cases the Attorney General, acting through Garrett, defended the position which he had taken before the Board, acting as Counsel for either the State of Alabama as intervenor or the State Comptroller. In every instance where the cases were appealed to the Supreme Court of Alabama, the position which the Attorney General had taken before the Board was sustained. A list of these cases, in all of which Garrett represented the Attorney General, follows:

Dunn Construction Company v. State Board of Adjustment, 175 So. 383; Ballenger Construction Company v. State Board of Adjustment, 175 So. 387; Lee (State Comptroller) v. Cunningham, 176 So. 475, cert. denied, 176 So. 477; Turner v. Lumbermen's Mutual Insurance Company, 180 So. 300.

During this time Garrett has handled either individually or with others, a number of cases, other than Board of Adjustment cases or criminal appeal cases. The most important of these cases are summarized as follows:

He handled individually the case of Southern Railway Company v. Webb, 167 So. 729, and the companion case by the same name in the Court of Appeals in 168 So. 227. These were suits to test the validity of the one mill county tax for school purposes and certain special school district taxes in Cherokee County. The Courts held both the county tax and the district taxes valid.

With Assistant Attorney General Rowe he handled the case of Henry v. Drennen Motor Car Company, 180 So. 667. This was a declaratory judgment suit to determine certain questions concerning the liability of automobile dealers for penalties, etc., on motor vehicle licenses purchased by them after November 14th for used motor vehicles which had come into their possession after October 1st but had not been operated by them prior

to the date on which they sought to buy the licenses. In this case, the Supreme Court sustained the holdings of an opinion of this office on this matter which had been prepared by Garrett.

With Assistant Attorney General Loeb he handled the case of Keller v. State Board of Education, 183 So. 268. This was a declaratory judgment suit in which the Supreme Court of Alabama held that the higher institutions of learning of the State could issue special obligation bonds for the purpose of securing funds with which to match Federal grants, the proceeds of which were to be used for the erection of buildings, etc., at these institutions. The decision in this case resulted in the various higher institutions of learning in the State of Alabama securing approximately \$3,000,000.00 in Federal grants and loans for building purposes.

With the Attorney General, he prosecuted the impeachment proceedings against the Sheriff of Henry County before the Supreme Court of Alabama. The charges against this Sheriff were based upon his actions in permitting a mob to take a prisoner from his custody and lynch him. He was acquitted by the Supreme Court.

With Assistant Attorney General Lawson he prosecuted the impeachment proceedings against the Probate Judge of Morgan County before the Supreme Court of Alabama. The charges against the Probate Judge were based upon his misuse of certain funds that had come into his custody as Probate Judge. He was convicted by the Supreme Court and removed from office.

With Special Assistant Attorney General Sam Rice Baker he is handling the case of Baker v. Lee, which has already been tried in the Circuit Court of Montgomery County and has been taken under advisement by the presiding Judge of that Court. This is a declaratory judgment suit between the State Health Officer and the State Comptroller to determine whether or not the State Comptroller should release to the State Health Officer some \$80,000.00, representing the balance of the appropriation to the State Health Department for the fiscal year 1936-1937 which was not released. The Attorney General is representing the State Health Officer in this suit.

With the Attorney General and other regular and Special Assistant Attorneys General, he is participating in the case of State ex rel Wilkinson v. Murphy. This is a quo warranto proceeding to test the constitutionality of the Alabama Beverage Control Act, in which the Attorney General and his associates are defending the constitutionality of the Act. The Act was held constitutional by the Circuit Court of Jefferson County and the case is set for hearing in the Supreme Court on December 23, 1938.

During the entire time that he has been an Assistant Attorney General, Garrett has been assigned to the Criminal Division which handles all criminal appeal cases in both the Court of Appeals and the Supreme Court. During a considerable part of this time he has had charge of this Division. In this capacity he has briefed numerous criminal cases in both Courts, and during the time that he was in charge of the Criminal Division, as is currently the case, he has handled all submissions of criminal cases in both Courts and the assignment of cases to the other members of the Criminal Division for briefing. In this connection it might be stated that he has on two occasions been assigned to conduct Grand Jury investigations in different counties, due to the temporary incapacity of the Circuit and County Solicitors of those counties.

During this time he has prepared a large number of official opinions and has answered informally a much larger number of requests for advice.

Shortly after the Alabama Beverage Control Act was passed, he was specially assigned to the preparation of official opinions in answer to a large number of requests for advice as to the proper interpretation of that Act. He has prepared the majority of the opinions rendered by the Attorney General on this subject and has reviewed practically every other opinion rendered on this subject.

REPORT OF JOHN J. HAYNES, ASSISTANT ATTORNEY GENERAL

John J. Haynes was first appointed an Assistant Attorney General on January 18, 1927. He was reappointed Assistant Attorney General on January 19, 1931, under the next administration. He was again reappointed an Assistant Attorney General on January 4, 1935, the beginning of this administration. He has held the office of an Assistant Attorney General continuously from January 18, 1927, to date under three different administrations.

During this administration he has been assigned the duty of passing on all applications for the extradition of criminals, both the applications from the State of Alabama on other states and the applications from other states on the State of Alabama. This office, during the present administration, has passed on 704 applications, 488 by Alabama on other states for the return of fugitives to this State, and 216 by other states for the return of fugitives arrested in Alabama. The number of applications for extradition handled by this office during this administration is greater than that of any previous administration.

For the last three years, he has been assigned to the Criminal Division of this office and has briefed criminal cases, both in the Supreme Court and the Court of Appeals.

During this administration he has been assigned to the opinion department. In this capacity, he has written many official opinions and answered a much larger number of requests for advice in an informal manner.

REPORT OF WALTER J. KNABE, ASSISTANT ATTORNEY GENERAL

Walter J. Knabe was appointed an Assistant Attorney General in February, 1935.

Among the civil cases in which he participated are the following:

State of Alabama v. Southern Bell Telephone and Telegraph Company et al, 234 Ala. 545, 176 So. 308. This was a petition on the part of the State of Alabama to secure a reduction in the rates of the Southern Bell Telephone and Telegraph Company. Hearings were held intermittently over a period of several months before the Public Service Commission. The matter was then heard by the Circuit Court of Montgomery County, and was subsequently appealed to the Alabama Supreme Court. The case resulted in a reduction to telephone subscribers of \$250,000 annually and a reduction in the charge on hand sets from twenty-five cents per month to fifteen cents per month.

Leedy v. Taylor, et al, 231 Ala. 317, 164 So. 820. This was a taxpayer's suit seeking to enjoin the Clerk of the House of Representatives and others

from paying certain sums equal to two dollars per day to legislators for expenses. The action was dismissed in the Supreme Court on motion of the State of Alabama, because of the death of the taxpayer.

Wilson v. State, 27 Ala. App. 560, cert. den. 234 Ala. 642, 176 So. 620, cert. den. 176 So. 622. In this case the validity of that part of the 1935 Revenue Act which provides for a license fee on attorneys, and appropriates ten dollars of each license fee for the use of the Alabama Bar Association was established. This case was especially important to the Alabama Bar Association as it concerned the revenues of that organization.

Southern Industrial Institute v. Lee, 234 Ala. 404, 175 So. 365. This case involved a construction of the Budget and Financial Control Act. The question arose over the right of the Southern Industrial Institute to receive a payment of forty-two thousand dollars appropriated prior to the enactment of the Budget and Financial Control Act.

City Paper Company v. Long, 25 Ala. 653, 28 So. 324. This was a sales tax case which determined that wholesalers of wrapping paper, cartons, twine and other such articles are subject to the sales tax.

Reynolds v. State, 181 So. 797. This was a habeas corpus proceeding, filed as a test case seeking to secure the release of convicts who had been placed on probation before the Sanderson Probation Act was declared unconstitutional. The State was successful in preventing the granting of the habeas corpus.

Wisconsin Coosa Company v. State, 231 Ala. 543, 165 So. 838. In this case the State of Alabama sought to collect a franchise tax from a foreign corporation which was the lessor of all of its property in Alabama. The Supreme Court upheld the State in its right to levy the tax, holding that under the facts of the case the lessee was the agent of the lessor.

Pullman Standard Car Company v. State, 235 Ala. 493, 179 So. 541. In this case the right of the State of Alabama to levy a franchise tax on a foreign corporation which was the lessee of property nominally owned by a domestic corporation with small capital, which property had been purchased with funds supplied by another foreign corporation, which was the holding company for both domestic and foreign corporation, that is the lessor and lessee corporations was tested. The Supreme Court denied the right of the State to levy the tax on the lessee of the property, but upheld its right to tax certain intangibles which the court held to have acquired a business situs in Alabama, due to the operations of the lessee company.

Consolidated Coal Company v. State, 183 So. 650. This is the latest of the franchise tax cases. The State of Alabama sought to levy a franchise tax on a foreign corporation which had leased all of its Alabama properties. The Supreme Court in this case laid down the broad and comprehensive rule that while the state would not be entitled to levy a franchise tax twice on the value of the same property that nevertheless no corporation or corporations could evade the payment of the franchise tax through the organization of separate corporations.

Reynolds v. Fabritis, 233 Ala. 625, 172 So. 889. In this case the constitutionality of the act levying a tax on punch boards and playing cards was upheld. The enforcement features of this section of the revenue act consisted of the enforcement provisions of the tobacco tax act. The court

in this case in reality upheld the constitutionality of both acts. This case also laid down the principle that where a section number is omitted through inadvertence during the passage of a bill, that references to such omitted section in other sections of the act will be held to be references to the section which should have borne the omitted number.

Stanley v. State, 234 Ala. 66, 173 So. 609. In this case, the validity of the tobacco tax law which was attacked on several constitutional grounds was upheld.

In addition to the foregoing cases, Knave handled two of the principal condemnation cases in behalf of the Highway Department. One of these was instituted to secure rights-of-way for the overpass required at Evergreen, Alabama, and the other to secure certain rights-of-way to obviate a grade crossing on the Old Shell Road in Mobile County. About fifteen parcels of land were involved in the latter.

About seventy-five condemnations of property on the part of the United States government, in reference to land in which the State of Alabama has an interest (usually for taxes), are being handled by Knave.

The writing of opinions, serving temporarily on boards, briefing of criminal appeal cases and other work of a general nature were included in his assignments.

Among his present assignments is the case of **Long v. Stokes** now on appeal to the United States Supreme Court. This involves the taxation of certain intangibles which the State contends have acquired a situs for tax purposes in the State of Alabama.

REPORT OF FRANCIS M. KOHN, ASSISTANT ATTORNEY GENERAL

Francis M. Kohn was appointed an Assistant Attorney General on October 1, 1935, and has devoted his full time to the discharge of his duties as such since that date.

Immediately after his appointment as Assistant Attorney General he was assigned to the State Securities Commission where most of his duties as Assistant Attorney General have been performed. He has advised Mr. Robert H. Harris, Secretary to the Commission, from October 1, 1935, to date.

He was of counsel in the cases of *State of Alabama v. R. A. Williams*, former President of the American Investment Trust, Inc., and *A. L. Wilkey*, an official of said Company, in Cullman County, Alabama, in which Williams and Wilkey were convicted of violating the Alabama Securities Act and were sentenced to the State Penitentiary for a term of years. They had defrauded the Cullman County farmers out of approximately \$40,000 by selling them worthless securities.

The Securities Commission recovered \$14,000 of registered bonds for Mr. Robert Kirkpatrick of Cecil, Alabama. Mr. Kirkpatrick had been defrauded by a securities salesman from Louisiana.

The Commission made a complete investigation of the whiskey warehouse receipts and decided that they should not be sold in Alabama. The Commission denied the application of the Kentucky Distillery Company to sell warehouse receipts in Alabama.

The Commission denied the application of the Cimeron Petroleum Trust. This was an oil stock promotion scheme. After the Commission denied the application the Trust was investigated by the S.E.C. at Washington, and the sale of the issue was enjoined.

The Commission denied the application of the Minderhout Syndicate. This was another oil stock promotion scheme. The Syndicate is now being investigated by the S. E. C. at Washington.

The Commission has ordered all investment companies selling securities in Alabama to substitute for the existing collateral which has been held outside of the State collateral of a known value to be held under a proper trust agreement in Montgomery, Alabama, for the benefit of the Alabama investors of the said companies only.

Kohn assisted in the preparation of a trust agreement between the Investors Syndicate and the First National Bank of Montgomery, as Trustee, under which Two Million, Nine Hundred Seventeen Thousand, Four Hundred Twenty-Four and 4/100 Dollars (\$2,917,424.05) of securities are held in trust by the bank as collateral for the Alabama investors of the Investors Syndicate.

He was of counsel in the case of State of Alabama v. Pullman-Standard Car Manufacturing Company, 179 So. 541. This case involved the State franchise tax.

He represented the State in the case of State of Alabama ex rel. Mobile County v. Ed J. Huet. This case involved a construction of the 1932 Alabama Motor Carrier Act. After a hearing in the Circuit Court of Mobile County, Alabama, the mandamus was denied.

He represented the State on appeal and filed a brief in the Court of Appeals in the case of Kenneth Sayers, Appellant, v. State of Alabama, Appellee. This case involved the speed limit for automobile trucks under the Alabama statute. The case was affirmed by the Court of Appeals and was not carried to the Supreme Court.

During the entire time he has been an Assistant Attorney General he has been assigned to the Criminal Division which handles all criminal appeal cases in both the Court of Appeals and the Supreme Court and in this capacity has prepared approximately forty briefs in the appellate courts.

During the latter part of the administration he represented the Attorney General on the Board of Compromise and acted as Secretary of said Board. He has prepared approximately fifty decrees for the Board of Compromise.

During the time he has been an Assistant Attorney General he has prepared a large number of official opinions and has answered informally numerous requests for advice.

**REPORT OF WILLIAM H. LOEB, ASSISTANT
ATTORNEY GENERAL**

William H. Loeb was appointed an Assistant Attorney General on December 1, 1935. A number of the more important cases in which Assistant Attorney General Loeb participated and in which he appeared before the Appellate Court on behalf of the State are as follows:

Casmus v. Lee, 183 So. 185. This case began by mandamus against Hon. Charles W. Lee, Comptroller, to compel repayment of certain monies collected for punchboard tax. The Supreme Court affirmed a decision of the Circuit Court of Montgomery County holding that the State might levy a tax upon an illegal operation. i. e., the operation of punchboards which was forbidden by law as constituting a lottery.

Grimes v. State, 178 So. 69. While this case is a criminal case it is of particular interest in that the Court of Appeals and the Supreme Court upheld the conviction of a Tuscaloosa theatre operator for operating the so-called "Bank Night" plan. This case restated the law surrounding the operation of lotteries, or enterprises in the nature thereof, in the State of Alabama.

Walker v. Tuscaloosa County, 178 So. 543. This was a test suit to determine the exact meaning of Section 21 of the Sales Tax Act (General Acts 1936-37, p. 138) which allocated to the counties portions of revenue to be derived from the Sales Tax to be used exclusively for full time Health Service, Public Welfare or Extension Service in cooperation with the several State and Federal agencies. It was held that the Legislature intended that the State agencies were to exercise their judgment as to whether expenditures were within the meaning of the terms "Public Health," "Public Welfare," and "Agricultural Extension Service."

Keller v. State Board of Education, 183 So. 268. In this case the Supreme Court held that the State Teachers' College could borrow money from the Federal Government on a loan and grant plan and pledge special obligation bonds therefor. As a result of this decision the various institutions of higher learning throughout the State have received some three million dollars (\$3,000,000.00) in grants and loans from the Federal Government.

Southern Industrial Institute v. Lee, 175 So. 365. This case involved a construction of the Budget and Financial Control Act. The Supreme Court of Alabama found that an Act appropriating fifty thousand dollars (\$50,000) for construction and equipment of buildings for the Southern Industrial Institute was not repealed by the provisions of the Budget Act.

Tennessee Coal, Iron and Railroad Company v. State Tax Commission, 177 So. 905. This was a suit filed by the State of Alabama to collect seventy-five thousand dollars (\$75,000) in gross receipt taxes which the Tennessee Coal, Iron and Railroad Co. had refused to pay claiming that sales made in commissaries which it operated were exempt from the tax. The ruling of the Circuit Court of Jefferson County upholding the liability of the Tennessee Coal, Iron and Railroad Co. was sustained by the Supreme Court on appeal by the Tennessee Company.

State ex rel. Wilkinson v. Murphy. This is a quo warranto proceeding to remove a member of the Alcoholic Beverage Control Board and testing the

constitutionality of the Alabama Beverage Control Act, and is pending before the Supreme Court of Alabama. In this case Loeb was associated with the Attorney General and other regular and special Assistant Attorneys General.

Assistant Attorney General Loeb has also participated in the following declaratory judgment suits seeking to test certain questions concerning the Sales Tax Act (General Acts 1936-37, page 138.) In all of these cases the Supreme Court handed down opinions sustaining the contention made by the State and the office of the Attorney General:

Pappanastos v. State, 177 So. 158, upholding the right of the State to collect Sales Tax from restaurant operators.

Hattemer v. State Tax Commission, 177 So. 156, upholding the right of the State to collect Sales Tax from Coal and Coke dealers.

Bowman v. State Tax Commission, 178 So. 216, upholding the right of the State to collect Sales Tax from Mule Dealers.

Wood Preserving Company v. State Tax Commission, 179 So. 354, upholding the right of the State to collect Sales Tax on telephone and telegraph poles, cross ties, cross arms, etc., sold by the Wood Preserving Company.

In **State Tax Commission v. Burns, 182 So. 17**, however, the Court refused to allow the State to collect Sales Tax upon food given in lieu of wages by the restaurateurs to their employees.

Loeb appeared on the brief with Assistant Attorney General Bowen Simmons in the case of **Ware Lodge v. Ancient Free and Accepted Masons, 182 So. 59**. In this case all property of the Masonic Lodges and subordinate Lodges were held to be exempt from ad valorem taxation regardless of the purpose for which said property was employed; this on the theory that the Grand Lodge received such exemption under a contract which could not be abrogated by any subsequent Act of the Legislature.

Since his appointment on December 1, 1935, Loeb has briefed many criminal cases in the Court of Appeals and the Supreme Court.

In addition to the matters above enumerated, Loeb has rendered numerous official opinions, answered innumerable informal requests for legal advice and examined a number of adstracts submitted on petitions to secure grants of patents from the State. In addition to this, he has handled more than 100 examiners reports submitted by the Comptroller's office charging various County officials with default. In this capacity he has collected many thousands of dollars for the State from the defaulting officials and their bondsmen.

In 1937, Loeb was assigned to represent the State in all criminal cases in Pickens County Circuit Court and to represent the State with the Grand Jury and in all criminal cases in Marengo County Circuit Court due to the illness of the Solicitor during the Fall Term of those courts.

He has also acted in the special capacity of advisor to the Department of Public Welfare and is now preparing a Code of Welfare Laws for that Department to submit to the Legislature at its 1939 session.

**REPORT OF CHARLES L. ROWE, ASSISTANT
ATTORNEY GENERAL**

Charles L. Rowe was appointed an Assistant Attorney General shortly after the beginning of this administration.

His principal non-legal assignment has been to sit for the Attorney General as a Member of the Board of Pardons at the regular monthly sessions thereof; and to investigate pardon files and make recommendations thereon.

During the term the Board has considered 5,578 application for clemency. Of the number 2,227 applications were unanimously recommended, and 871 applications were recommended by a majority of the Board, 1,479 applications were unanimously denied, and 626 applications were denied by a majority.

On application for full pardon and restoration of civil and political rights, 375 applications were submitted, of which 322 were unanimously recommended by the Board, 30 were recommended by a majority, 6 were unanimously denied and 17 were denied by a majority.

Of the 2,227 applications unanimously recommended by the Board, the Governor paroled 1,562 and denied 665.

Of the 871 applications recommended by a majority, the Governor paroled 401 and denied 470.

Of the 1,479 applications unanimously denied by the Board, the Governor paroled 17 and denied 1,462.

Of the applications denied by a majority of the Board, the Governor paroled 45 and denied 581.

Of the 322 applications for full pardon and restoration of civil and political rights unanimously recommended by the Board, the Governor pardoned 236 and restored applicants' rights of citizenship, and denied 86.

Of the 30 applications recommended by a majority of the Board, the Governor pardoned 25 and restored applicants' rights of citizenship, and denied 5.

Of the 6 applications unanimously denied by the Board the Governor pardoned none.

Of the 17 applications denied by a majority of the Board, the Governor pardoned 2 and restored the applicants' rights of citizenship, and denied 15.

It is interesting to note that of the 2,194 applications in which the Governor granted permanent paroles, together with the numerous temporary paroles and test paroles issued during the period, 87 of the parolees were subsequently charged or convicted of crime or misconduct so that their paroles were revoked.

He has prepared numerous official opinions to various state and county officials and answered informally a much larger number of requests for advice.

In addition, he has prepared and tried many civil cases in which the State has been involved. Perhaps the most important of them was Carmichael as Attorney General v. Southern Coal and Coke Company, in which the constitutional validity of the Alabama Unemployment Compensation Act was involved. In collaboration with the Attorney General, several Assistants, and several Special Assistants, he aided in the preparation and the trial of this case in the Federal District Court and in the Supreme Court of the United States. The constitutionality of the Act was upheld.

Of the criminal cases in which he participated, perhaps the most important were the Grand Jury investigations and subsequent prosecutions of homicides growing out of the industrial disputes in St. Clair County and in Talladega County.

REPORT OF JAMES L. SCREWS, ASSISTANT ATTORNEY GENERAL

James L. Screws was first appointed an Assistant Attorney General on October 1, 1929. He was reappointed an Assistant Attorney General on January 19, 1931, under the next administration. He was again reappointed an Assistant Attorney General on January 4, 1935, the beginning of this Administration. He has held the office of an Assistant Attorney General continuously from October 1, 1929, to date under three different administrations.

During this administration he has performed services pertaining to practically every function of this office.

He has written numerous official opinions and has answered informally a much larger number of requests for advice. The last part of this administration he has acted as one of the two section chiefs of the opinion division of this office. In that capacity he approved for final form the opinions written by the assistants in his section.

In the first part of this administration he acted as chief of the criminal division of this office. In that capacity he had charge of the criminal cases which were appealed to the Supreme Court and the Court of Appeals. As well as writing many briefs on behalf of the State in these criminal appeal cases, he supervised the writing of such briefs by other assistants.

He has handled numerous cases against state and county officers wherein such officers were charged with shortages by the reports of Examiners of Public Accounts. He has successfully settled most of these cases without resort to litigation.

He has handled other civil litigation in which the State was an interested party. The most important cases handled by him were National Linen Service Corporation v. Henry S. Long, et al.; Sam Pharr v. I. C. Whittle; and State v. Tuscaloosa County, et al., 223 Ala. 611, 172 So. 892.

The National Linen Service Corporation case involved the constitutionality of Section 2(d) of Act No. 126, H. B. 179, approved February 23, 1937, (General Acts 1936-1937, p. 125), which subsection levied a so-called "use tax." The Circuit Court of Montgomery County upheld the constitu-

tionality of the statute in question and the case is now pending on appeal to the Supreme Court.

The Pharr case involved the question of final jurisdiction of justices of the peace to try violations of Act No. 198, Senate Bill 22, approved March 4, 1937, (General Acts 1936-1937, p. 229) which Act prohibits an habitual user of narcotic drugs or any person who is intoxicated from driving any motor vehicle upon any highway in this State. The Circuit Court of Montgomery County upheld the State's contention that justices of the peace had such final jurisdiction. The case is now pending on appeal to the Supreme Court. This case is of great importance to the State Highway patrolmen in the enforcement of the statute in question.

The Tuscaloosa County case was a test suit by declaratory judgment to determine whether or not the county should pay for the audit of the county superintendent of education and the county treasurer of school funds.

The first part of this administration he acted for the Attorney General as a member of the State Board of Compromise, and as Secretary thereof. In this capacity he prepared the decrees of said Board.

He has handled practically all the land matters that have come to this office. These land matters include examinations of applications for patents, including the examination of abstracts in connection therewith, to Sixteenth Section lands, school indemnity lands, internal improvement lands, river improvement lands, and swamp and overflow lands. After the examination of the applications and abstracts in connection therewith, he made recommendations as to the issuance of same. He also has acted for the Attorney General on the Board of Compromise of School Lands, which Board deals with Sixteenth Section Land applications.

With further reference to land matters, he examined the abstract of title to the Cochrane Bridge when same was bought by the State, through the Alabama Bridge Authority, from the Mobile Bay Bridge Corporation.

He has also supervised the indexing of the official opinions of this office and the publication of the Quarterly Reports of the Attorney General.

REPORT OF BOWEN W. SIMMONS, ASSISTANT ATTORNEY GENERAL

Bowen W. Simmons was appointed an Assistant Attorney General on January 1, 1937.

He wrote a large number of official opinions in response to official inquiries received in this office. In addition, he prepared many unofficial opinions in response to inquiries written by persons who were not entitled to official opinions.

Complying with the policy of this office, he also reviewed a large number of opinions written by other Assistants, and for a time acted as chief of a section of Assistants with responsibility to review all opinions written by Assistants in his section before the opinions reached the desk of the Attorney General for final approval or rejection.

When the legislature, in special session 1936-1937, enacted a law exempting homesteads from the payment of taxes due the State of Alabama, this office was deluged with inquiries from tax officials for official opinions on exemption claims. Simmons was designated to give the homestead laws of Alabama a thorough investigation and review in order to determine the validity of the many claims about which inquiry was made. At one time, he appeared before the annual associational meeting of the county tax assessors and collectors of Alabama, held in Montgomery, to acquaint the attending officials with the exemption laws as they applied to the many problems presented to their offices. Also the Comptroller's office, as well as the State Tax Commission, had to be advised on the procedure they should employ relative to the granting of these exemption claims, and a large part of that work was done by Simmons.

In addition to the homestead exemption law, the legislature, at the same special session above mentioned, enacted a sales tax law that was a new form of general license taxation in Alabama. This law caused numerous inquiries and suits to determine the application of the same to an admitted statement of facts. Simmons was assigned a large portion of this work. Simmons participated on behalf of this office in many of the numerous suits filed to obtain a declaratory judgment of the Courts of Alabama on the liability vel non of the several petitioners for payment of the tax, among which were the following: *Doby et al. v. State Tax Commission*, 174 So. 233; *Lone Star Cement Company et al v. State Tax Commission et al*, 175 So. 399; *Frazier v. State Tax Commission*, 175 So. 402; *State Tax Commission v. Hopkins*, 176 So. 210; *Long et al v. Roberts & Son*, 176 So. 213; *Bowman et al v. State Tax Commission*, 178 So. 316.

In addition to the above Simmons was assigned to the Criminal division and briefed many of the criminal appeals which this office is required to brief for the State of Alabama.

REPORT OF CLARENCE M. SMALL, ASSISTANT

ATTORNEY GENERAL

Clarence M. Small was appointed an Assistant Attorney General on June 1, 1935.

He was assigned to the opinion division. During the first few months of his service as an Assistant Attorney General, he was given the majority of requests for construction of the laws affecting costs and fees of county officers and represented the State of Alabama in cases before the Board of Compromise involving amounts charged to county officers in reports of the Examiners of Accounts.

Numerous requests, both formal and informal, concerning registration of voters and involving the much amended laws controlling registration of voters were referred to him and he prepared replied to the same, both official and informal, construing the newly enacted laws of 1935, 1936, 1937, governing this important matter.

Small, in conjunction with the Attorney General and several Assistant Attorneys General, regular and special, handled the cases which tested the constitutional validity of the Federal Unemployment Compensation Act and the Alabama Unemployment Compensation Act. The constitutionality of both Acts was ultimately sustained in the Supreme Court of the United States.

Small was assigned to the criminal division and has briefed a large number of criminal cases. For a time he was chief of the criminal division and submitted all criminal cases on appeal.

Small has served as special prosecutor in criminal cases in Choctaw and St. Clair Counties, and has assisted with Grand Jury work in Clay and Pickens Counties.

Small has handled several cases for the State Highway Department, the State Tax Commission, and the State Department of Agriculture, in all of which judgments have been rendered favorable to the State of Alabama and from which judgments no appeals were taken.

Under the provisions of the Acts of 1935, the State Milk Control Board, the Alabama Unemployment Compensation Commission and the Public Welfare Departments were organized and Small was assigned to advise these respective departments on questions in connection with their organization.

In addition to the above duties, he has written a large number of opinions, answered numerous informal requests, and has handled several examinations of titles involved in applications for land patents to State School lands.

OPINIONS

October 6, 1936.

Hon. Geo. W. Andrews,
Circuit Solicitor,
3rd Judicial Circuit,
Union Springs, Alabama.

Court of County Commissioners—Acts 1931, page 687, authorizes appropriation of county funds for purchase of athletic equipment for physical training of students in public schools.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry as follows:

"The Court of County Commissioners of Bullock County desires to make a donation from the general fund of the County of \$250.00 to the Union Springs High School Athletic Association. This money is to be used by the said association for the purpose of purchasing athletic equipment for the High School. Please let me know if this can be legally done."

If I properly construe your inquiry, the Union Springs High School Athletic Association is an agency of a public school of Bullock County and the athletic equipment proposed to be purchased by it will, in fact, belong to the said High School for the exclusive use of its students. Upon such a construction, it is my opinion that your inquiry must be answered in the affirmative.

Of course, if the Union Springs High School Athletic Association is an independent organization, not under the control and direction of, and in fact a part of, a public school of the county; and if the athletic equipment which it proposes to purchase will belong to such association, and not to a public school, an appropriation of public funds to it for any purpose is unwarranted.

Section 1 of Acts 1931, page 687 provides:

"The Courts of County Commissioners or Boards of Revenue of the several Counties of Alabama are hereby authorized at any meeting of said Court in any calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the County Treasury for the support of the Public Schools within said County."

This office has heretofore held that the above quoted act authorizes an appropriation of county funds to any public school for specific school purposes to be decided upon by the county governing body. See Biennial Report of Attorney General, 1932-1934, page 195.

Physical education of students in the public schools of Alabama is a recognized and required part of their curricula. Section 621, Alabama School Code of 1927. And the Division of Physical and Health education of the State Department of Education is required to outline a course of physical training for the various schools of the state. Alabama School Code of 1927, Section 20.

In my opinion an appropriation for the procurement of athletic equipment in furtherance of a course of physical training in a public school is "for the support of the public schools" within the meaning of the 1931 Act quoted, *supra*.

A copy of a former opinion of this office appearing in Opinions of the Attorney General, Office Edition, Book 2-A, page 185, dated February 19, 1935, is enclosed to the end that there may be no question of the proper manner of paying out the appropriation, if made.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 6, 1936.

Hon. E. S. Tunstall,
Tax Assessor,
Baldwin County,
Bay Minette, Alabama.

Taxation—

1. Return of property to the tax assessor, made by an agent for a property owner who is a non-resident, should give the residence and address of the owner, if the same is known by the agent making the return.

2. Failure to give the residence and address of the owner in such a case does not invalidate the assessment and the tax assessor cannot reject such a return because he does not give the owner's residence and address, provided, however, the agent making the return has given satisfactory proof to the assessor that he does not know the owner's residence and address.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 30th and your letter subsequent thereto in which you make the following inquiry:

1. Should a return of property made by an agent for a property owner who is a non-resident give the residence and address of the owner of the property?

2. Does the tax assessor have the right to reject such an assessment, if the agent does not give the owner's address?

It is my opinion that your first inquiry should be answered in the affirmative. Section 33 of the 1935 Revenue Act, which deals with return of property for assessment purposes, provides in part as follows:

"Each taxpayer shall give to the assessor his occupation and post office address."

Section 37 of the same Act, which deals with the same subject, provides in part as follows:

"Each person shall enter upon the assessment list his occupation and post office address."

Section 40 of the Act, which deals with the subject of returns made by persons other than the owner, provides in part as follows:

" * * * And shall also as far as practicable give the residence and address of the owner but the failure to give such address shall not invalidate the assessment."

The above quoted provisions of the 1935 Revenue Act lead me to the conclusion that all returns of property to the tax assessor should contain the residence and address of the owner of the property. Therefore, your first question receives an affirmative answer.

My answer to your second question must be conditional. I again call your attention to the excerpt from Section 40 of the 1935 Revenue Act, which I have quoted above. It provides that all returns gathered by an agent for a non-resident property owner should, as far as practicable give the residence and address of the owner, but the failure to give such residence and address will not invalidate the assessment. Before you receive a return of property from an agent of a non-resident property owner without the residence or address of the property owner, you should require him to make satisfactory proof to you that he does not know the residence or address of the owner of the property. A person making a return is under oath to give true answers to all lawful questions put to him by you, touching the return which he makes, as is provided by Section 32 of the 1935 Revenue Act. You should have the agent to answer under oath the question of whether or not he knows the residence or address of the property owner. If his reply is in the affirmative, then you should refuse to accept the return unless the agent gives the property owner's residence or address. If the answer to your question is the negative, then you could not reject the return merely because of its failure to give the residence and address of the property owner and the failure to give his residence and address would not invalidate the assessment.

Therefore, you should not accept a return made by an agent for a non-resident property owner which does not give the residence and address of the owner, unless you are satisfied that the agent making the return does not know the owner's address. If the agent has made satisfactory proof to you that he does not know the residence and address of the property owner, then you should accept the return even though it does not give the owner's residence and address.

It might be well to remind agents who are making returns for non-resident property owners, as well as all other persons who make returns, that they are under oath to give correct answers to all lawful questions propounded by you in connection with the returns which they make, and that they are liable for appropriate legal action for any wilfully false answers or statements which they make in connection with said return.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 6, 1936.

Hon. E. T. Carpenter,
Clerk, Circuit Court,
Washington County,
Chatom, Alabama.

A trial tax of \$3.00 is imposed on each case, civil, criminal and equity, which goes upon the docket of any Circuit Court in this State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 15, 1936, in which you request my opinion as follows:

"The auditor has charged me a \$3.00 trial tax (which I did not collect from the parties) in a case where a suit was dismissed before trial by consent of the parties. I would like to know whether under the facts I am liable for the trial tax."

It is my opinion you should have collected the tax. I call your attention to Revenue Act, 1935, Section 9, which says in part:

"SECTION 9. A trial tax of three dollars (\$3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this state, * * * "

You will note this section does not say on all cases tried in the Circuit Court, but says all cases that go upon the docket of any circuit court in this State. Therefore, I am of the opinion that as soon as the case is filed and goes upon the docket, the trial tax attaches and must be collected.—
Biennial Report of Attorney General, 1930-1932, p. 263.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 6, 1936.

Hon. G. H. Boyd, Register,
Circuit Court, Jefferson County,
Birmingham, Alabama.

Costs in an injunction proceeding to abate a nuisance are paid under Section 4682, Code of Alabama, 1923, and not under Section 6518 of same Code.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 14, 1936, in which you request my opinion as follows:

"I have read with interest your opinion dated January 17, 1936, addressed to Hon. C. H. Keller, Register, Circuit Court of Cullman County, as recorded in the Quarterly Report of the Attorney General of Alabama, Vol. 2, page 57, with reference to the court costs on injunctions filed in Equity, wherein the State of Alabama is Complainant against persons operating liquor nuisances.

"In the opinion you state that the State of Alabama is not liable in the above mentioned cases when the Court fails to tax the costs against the State, even though the case has been dismissed by the State.

"I would appreciate an official opinion on the following:

"In injunction cases filed in this Court wherein the State of Alabama is Complainant against persons operating liquor nuisances and where the Court has rendered decrees dismissing the cases for want of prosecution **and taxed the court costs against the State of Alabama.**

"Please advise me whether or not the State is liable for the Court costs in the aforesaid cases.

"In the event you hold that the State is liable for the costs, I would appreciate it very much if you will advise me to whom the cost bills should be sent."

In answering your request, I call your attention to Section 4682, Code of Alabama, 1923, which is as follows:

"4682. Fees and allowances to officers making seizures when and how paid.—There shall be allowed the officer making the seizure under such writ in an injunction case the sum of three dollars and the sum of ten cents for every mile traveled in making the seizure, together with such reasonable sum as the court may deem just for necessary expenses incurred in transporting and providing storage for liquors and beverages and other movable property seized; all which costs shall be taxed in the bill of costs, and if not collected from the defendant, then shall be taxed and paid as in criminal prosecutions in which the state fails; and the costs in such injunction case, unless charged against some party defendant by the court and collected from him, shall be paid as in criminal cases in which the state fails, upon the court making an order to that effect."

I especially call your attention to the latter part of this section which says:

" * * * and the costs in such injunction case, unless charged against some party defendant by the court and collected from him, shall be paid as in criminal cases in which the state fails, upon the court making an order to that effect."

I take this to mean that if the State fails for any cause and the costs are not taxed against some party defendant by the Court and collected from him, then the costs shall be paid as in criminal cases in which the State fails. It is true, in your case the Court simply dismissed the case for want of prosecution and taxes the costs against the State where Section 4682, supra, says: " * * * upon the court making an order to that effect", and the order of the Court here does not go to this extent, but I think this section, so far as the costs are concerned, is exclusive, and when the costs are taxed against the State and nothing more this is sufficient to bring it under the terms and operation of Section 4682, supra, which in its last analysis means such costs must be paid from your Fine and Forfeiture fund.—*State ex rel. Wm. H. Holcombe, Jr. Geo. E. Stone, Treasurer*, 155 So. 636; *Quarterly Report of Attorney General*, Vol. 2, p. 57.

I do not think the section you refer to above, that is Section 6518, Code of Alabama, 1923, is applicable in cases of this character as Section 4682, supra, means to be exclusive in such matters.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 6, 1936.

Hon. Ray Henson, Chief Clerk,
Automobile Department,
State Tax Commission,
Capitol.

Motor vehicles—

(1) The provisions of Schedule 158.15 of the 1935 Revenue Act as amended by Acts 1936, p. 208, do not relieve a carrier otherwise so required from complying with the requirements of Common Carrier Act of 1931 (Acts 1931 p. 303), or the Contract Carrier Act of 1932 (Acts 1932, p. 178).

(2) Opinion to Wm. F. Black, dated Jan. 22, 1936, withdrawn.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of August 25, 1936, in which you ask that I review opinion of January 22, 1936, to Hon. Wm. F. Black of the Public Service Commission, holding that a non-resident contract carrier may enter State by complying with Schedule 158.15 of the 1935 Revenue Act, which Schedule I may add was amended by Act No. 177, approved April 21, 1936 (General Acts 1936, p. 208) without obtaining permit required by Section 5, H. B. 113 (General Acts 1932, p. 180).

Upon further consideration I am of the opinion that said opinion was laid in error.

Since 1911 the State of Alabama has had a statute regulating the licensing of motor vehicles. This was reenacted in full in 1923 (Acts 1923, p. 284) and by Section 22 of said Act it was provided in part:

"The registration fee or license tax herein required to be paid on motor vehicles shall be in lieu of all other privilege or license taxes which the State or any county or municipality might impose, where the motor vehicle is used by the owner * * * ."

This Act with certain amendments continued to be the Act providing for revenue and providing for **registration of motor vehicles** and providing the license fee therefor until the passage of the General Revenue Act of 1935 which carried as a complete reenactment the Act of 1923 with amendments and changes, which appears as Article XIII, Chapter 6.

This Chapter carried as a part of Schedule 158.18, the same provision, which appeared in the 1923 Act and quoted as authority in the former opinion, to-wit:

"The registration fee or license herein required to be paid, on motor vehicles shall be in lieu of all other privilege or license taxes which the State, or any county or municipality thereof might impose, where the motor vehicle is used by the owner."

It is to be observed that all these provisions relate to the licensing and registration of motor vehicles rather than the regulation of the business of the carrier.

Under said Chapter 6, every motor vehicle therein defined must secure and display a registration tag with certain exceptions.

Among those exceptions are those found in Schedule 158.15. It is to be noted, however, that the exceptions are applicable only to "the **foregoing** sections relative to registration and display of registration numbers", negating any idea that the exceptions apply to any other provisions of law.

Subsequent to the 1923 Motor Vehicle Act and prior to the 1935 General Revenue Act, Act No. 273, approved June 19, 1931 (Acts 1931, p. 303) and Act No. 159, approved October 28, 1932 (Acts 1932, p. 178) were enacted.

The 1931 Act commonly known as the "Common Carrier Act" defines transportation companies and motor transportation companies, and provides for their **supervision, regulation** and taxation.

The 1932 Act defines "Contract Carriers and Common Carriers not subject to the 1931 Act and regulates the transportation for hire of persons and property on public highways by motor vehicles operated by contract carriers, provides for issuance of permits, posting of bonds, etc.

While both Acts levy Mileage taxes, they are both essentially regulatory in their nature and are directed at the persons operating as carriers rather

than at the motor vehicle itself. The contract act specifically declares that the excise tax levied is under the **police power** of the State (Section 22).

There is nothing, as I read the two Acts, limiting or changing the liability of the motor vehicle itself from securing the proper motor vehicle license as levied by the revenue laws, except this provision found in Section 22 of the 1932 Act.

"The taxes imposed by this section shall be increased 50% if the annual license tax prescribed by the law of this State on like vehicles is not paid because such motor vehicle is engaged in interstate commerce."

The only reason I can offer for this provision is that it was inserted out of excess of precaution. The State in requiring a license of motor vehicles operated on the public roads of Alabama is exacting a charge for the use of such roads. *Foshee v. State*, 15 Ala. App. 113, 72 So. 685; *Bozeman v. State*, 61 So. 604; *Ex Parte Bozeman*, 183 Ala. 91-103, 63 So. 201. That a state may levy such a charge on motor vehicles moving in interstate commerce is no longer in doubt. *Kane v. N. J.* 242 U. S. 160; *Hendrick v. Maryland*, 235 U. S. 610; *State v. Oligney*, 162 Minn. 302, 202 N. W. 893, 42 C. J. 670.

However, Section 22 also provides:

"Such mileage tax shall be paid by such common or contract carrier **in addition** to all other property, franchise, licenses, or other taxes, fees and charges now or hereafter prescribed by law. "

It seems plain from this that there was no purpose to disturb the laws relating to licensing of motor vehicles.

Among the regulations of the 1932 Act is that the carrier secure a permit as provided in Sections 5 to 13 inclusive, and make a bond as required by Section 26.

It is to be noted as stated above that these sections require the carrier to secure the permit and make the bond, and this is true whether he operates one or more motor vehicles.

The question then arises whether the issuance of the license permit authorized by Schedule 158.15 can relieve a contract carrier from qualifying under the 1932 Act, take out the permit therein required and make appropriate bond.

In my judgment it clearly has no such effect nor can the statute be so interpreted.

I think it is clear from the foregoing that a person taking out the full year's revenue license for a motor vehicle is not thereby relieved from qualifying as a common or contract carrier if he engages in such business, including of course securing carrier permit.

Schedule 158.15 as amended by Act No. 177, approved April 21, 1936 (General Acts 1936, p. 208) provides:

"Schedule 158.15. The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this State and not used for hire or used for commercial purposes in this State, for a period of 30 days from date of entering the State, provided that the owner thereof shall have complied with the provisions of law of the foreign country, State, territory or Federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration number as required thereby; Provided further that nothing herein shall be construed to permit the use of motor vehicles for hire or for commercial purposes by non-residents without complying with the provisions of this Act. Provided further, that motor vehicles of non-residents used for commercial purposes and making not more than two trips per month, each trip to be of not more than five days duration, may secure permit from the probate judge of the first county in this State which he enters, under such rules as the State Tax Commission may prescribe and upon the payment to the probate judge of a permit fee of \$1.00 and an issuance fee of 50c which permit shall grant the holder thereof two trips as above set forth during the month in which said permit is issued. **Provided, that motor vehicles of non-residents used for hire and making not more than three trips during any period of three months in this State and which pay all mileage taxes required by law, may secure a permit from the State Tax Commission under such rules as the State Tax Commission may prescribe and upon the payment of a Five Dollars (\$5.00) fee and an issuance fee of 50c for each trip to the probate judge; of the first county entered in this State provided each trip shall be reported to the State Tax Commission and said probate judge and no such motor vehicle shall make more than three trips in this State during any three month period and no such motor vehicle shall carry anything but goods to be transferred from without the State to points within the State, but such motor vehicle may, on its return trip, secure permit from a probate judge after the additional payment of Five Dollars (\$5.00) and an issuance fee of 50c, to carry goods on its return trip from points within Alabama to points without Alabama. Said permit shall be issued for a specified motor vehicle and shall not be transferable to any other person or any other vehicle. The State Tax Commission of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that will be considered as a fair exchange of rights and privileges. The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other. The above reciprocal agreement can be annulled on a notice issued to either party by the other party thereto within thirty (30) days thereafter."**

Schedule 158.15 is a part of Article XIII, Chapter 6, of the General Revenue Act of 1935, relating to the licensing of motor vehicles and its provisions constitute exceptions to the general requirements made therein.

Therefore no greater incidence can be given to the exception, than applied to the general provision. In fact that well known rule that exceptions and exemptions are to be strictly construed (See *Elba Bank & Trust Co. v. State*, 91 So. 991) should be invoked if the matter were in doubt.

I do not think the matter is one of doubt however.

The provision allowing a non-resident operating a motor vehicle for hire, and making not more than three trips into the State within a period

of three months to secure a permit from the State Tax Commission and pay \$5.00 and an issuance fee to the Probate Judge, is purely an exception to liability for full motor vehicle license, which, but for this exception, would be due, when the motor vehicle used for hire, enters upon the public roads of Alabama. This so-called permit and \$5.00 payment, is nothing more nor less than authority for the issuance of a license for temporary use, limited strictly by the terms of the statute, and exempts the persons securing such temporary license from the general liability for motor vehicle license for the limited period authorized.

The Tax Commission could if it desired under its powers to make rules and regulations, provide a tag, indicative of the granting of the permit and the payment of the amount levied.

So construed however, I read nothing in Section 158.15 relieving a carrier, who otherwise is required to so do from qualifying under the common or contract carrier acts.

I therefore hold that a carrier required to qualify under either the common carrier act of 1931 or the contract carrier act of 1932, is not relieved from such liability, by taking out motor vehicle license required by Article XIII, Chapter 6 of the 1935 Revenue Act and specifically by securing the permit and paying the amount, as authorized by Schedule 158.15 of said Article, Chapter and Act as amended.

The opinion to Wm. F. Black of January 22, 1936, above referred to is accordingly overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 6, 1936.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Licenses—County license per day as prescribed by Schedule 149 of the 1935 Revenue Act is one-sixth of one-half of the amount of the State license for week.

Dear Sir:

I wish to acknowledge receipt of your letter of September 2, 1936, in which you state:

“Will you please give me an opinion on Schedule 149 of the Revenue Law of 1935.

"If one of these shows should want to operate in this County and had taken out the \$25.00 license for the State, which is required for each week's operation, what should I charge him for one day or for each day for any number of days that he might want to operate in this County?"

In my opinion the State license under Schedule 149 of the 1935 Revenue Act is \$25.00 for one week, composed of six working days and Sunday. Quarterly Report of the Attorney General, Vol. 2, at page 44.

I wish to call your attention to Schedule 149 and part (b) of Section 350 of the 1935 Revenue Act, which provide as follows:

"Schedule 149. Each person operating or conducting vaudeville, and/or theatrical shows as transient, operating temporarily in different places in tents or otherwise, shall pay to the State a license of twenty-five dollars (\$25.00) per week for such show. A separate license shall be taken out for each week of operation. No County in collecting said license for said County shall charge a license, except for the number of days said shows operate in said County, and that license shall be in proportion that the days shown in said County bears to the weekly license. Provided that this section shall not apply to any show operating in a theatre regularly licensed."

"SECTION 350. * * * (b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

The county license for one week should be \$12.50 or one-half of the State license for the same period.

The amount of the county license shall be the proportion the days operated in the county bears to the weekly license. In other words, if the show operates one day in the county, the license should be one-sixth of \$12.50, or \$2.08.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 6, 1936.

Hon. B. F. Burch,
Tax Collector,
Russell County,
Seale, Alabama.

Under the authority of Underwood Typewriter Company v. Marengo County Bank, 82 So. 158 it is the duty of the Court of County Commissioners, Board of Revenue or other like governing body to furnish typewriter to Tax Collector of various counties of the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 10, 1936, in which you request my opinion as follows:

"I am Tax Collector of Russell County and as such officer I am compelled to have a typewriter in my office. When I took office last October the County Commission refused to furnish me with a typewriter, so I went ahead and bought one myself and paid for it. The County Commission furnishes a typewriter to every County officer except me and I am writing to ask you if there is any way to force them to pay for the one that I bought myself."

I am not saying whether or not you can compel the county to pay you for a typewriter you have already purchased and paid for but there is no question but that it is the duty of the county to furnish you with a typewriter under Section 9604 Code of Alabama of 1928 (Michie) which is as follows:

"9604. STATIONERY OF OFFICERS PAID FOR BY COUNTY.—

The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

Our Supreme Court in the case of Underwood Typewriter Company vs. Marengo County Bank, 82 So. 158, held that the term **stationery** as now used in Section 9604, supra, includes typewriter. Therefore, under the authority of the above cited case, there is no doubt but it is the duty of Russell County to furnish you a typewriter as Tax Collector of said County. (Biennial Report 1928-30, Page 222).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 6, 1936.

Hon. E. E. Gewin,
Tax Assessor, Hale County,
Greensboro, Alabama.

Bail—Tax Assessor prohibited from signing an appearance bond.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of August 26, 1936, in which you state that you are Tax Assessor of Hale County, Alabama.

You request my opinion.

"Can I, individually, sign an appearance bond for a defendant who is charged with a criminal offense?"

In my opinion your inquiry should be answered in the negative.

Section 3378 of the 1923 Code of Alabama forbids any judicial or ministerial officer of this State to go bail for any person charged with a criminal offense. This section reads as follows:

"Section 3378. Certain forbidden to become bail in certain cases.—It shall not be lawful for any judicial or ministerial officer of this state to go bail for any prisoner or other person tried before him, or put in his charge under any criminal accusation, or to sign any bond or other obligation for the release or appearance of such person, either before himself or any other officer or officers."

In my opinion, a tax assessor comes within the prohibition of the statute, *supra*. A tax officer is both a judicial and ministerial officer. For listing property, taking oaths, making abstracts, etc., his duties are ministerial. When he values and assesses same he acts judicially.

This office had previously ruled that a clerk of the Circuit Court was a ministerial officer of the State, and as such was prohibited from signing a bail bond.—Biennial Report of Attorney General, 1928-1930, p. 747.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 7, 1936.

Hon. O. S. Nichols,
Tax Assessor, Perry County,
Marion, Alabama.

Taxation—Tax Agents.

Revenue Act 1935—Tax agent or representative of Tax Commission not authorized to go through assessment books or records and raise the assessment values, but works in an advisory capacity with the assessor and Board of Review.

Board of Review may disregard raised valuations placed on the assessment sheets by a tax agent or representative of the Tax Commission.

If the Board of Review raises a taxpayer's assessment, it is the duty of the secretary, who is the tax assessor, to notify the taxpayer by registered mail.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Referring to Section 68, page 34, of the Revenue or House Bill 324, of the Regular Session of the 1935 Legislature.

"Does a State Tax Agent, or representative of the State Tax Commission have the authority, or any authority, to go through the assessment books or records of a county and raise the values of real estate, before the Board of Review or Board of County Commissioners have met to review, inspect, revise or likewise make any changes that they see fit to make, at which time the law requires them to meet for such, which is on the second Monday in March.

"In several instances this agent has gone through the books and raised a taxpayer's land values even before the taxpayer has made his assessment for the current year. This agent or representative of the State Tax Commission would not have any authority to raise a taxpayer's value before he made his assessment, or before the Board had met to make any adjustments if any be needed. He makes the raise by setting his figure in the column for the Board of Review to set their figure if there be any change.

"In the case where this agent has raised Mr. Jones' real estate value by putting the raise figure in the Board of Review column, what would the Board of Review do in case that they find that their review and inspection of this land of Mr. Jones that the preceding value that was paid on the year before was 60% of the value and they did not agree on the raise figure entered by this agent.

"When the Board meets in March to review and adjust any taxpayer's assessment and finds that the figure that the taxpayer assessed his property at which was the same figure as 1935, and that this agent has raised the assessment, and the Board unanimously voted to put this assessment value back to the value of 1935 just as the taxpayer had assessed it at, what will be the outcome of this raise figure put there by this agent.

"In the case where this agent makes any raises in value it is his duty to notify each taxpayer that there has been a raise in the value and not the Tax Assessor's duty to notify any taxpayer, this is correct as I see and understand the law. Please give your opinion.

"As I understand the law, the secretary of the Board of Review which is the Tax Assessor, must notify each taxpayer in the event the Board has raised his assessment value, but not the Assessor's duty to notify in the event the tax agent has made a raise."

In my opinion, a State Tax Agent or representative of the State Tax Commission does not have the authority to go through the assessment records of a county and raise the assessment values.

I wish to call your attention to parts of Sections 47, 48, 67, 68 and 73 of the 1935 Revenue Act, which are as follows:

"SECTION 47. The assessor shall, from information entered on the tax return list and from all other information known to him, or which he may procure, proceed to ascertain what, in his best judgment, is a fair and reasonable market value for each item of property returned by or listed to any taxpayer; provided, however, that the assessed value of any real estate or improvements as fixed for taxation for the year next preceding the then current tax year shall be prima facie the basis of the value of such property for assessment for the current tax year and such property shall not be assessed for taxation at a less valuation unless upon evidence submitted to the Board of Review, as provided for herein, * * * "

"SECTION 48. The State Tax Commission or the agents or assistants therefor, may work in an advisory capacity, with the several county tax assessors of the State in the assessment and valuation of property. * * * "

"Section 67. * * * provided that at any time the State Tax Commission shall deem it necessary, it may go or send or use agents or representatives into any county with authority to act in an advisory capacity and in conjunction with the Board of Review and perform such other duties, with respect to the valuation and assessment of property for taxation as may be required of them."

"SECTION 68. Agents or representatives of the State Tax Commission assigned to any county or counties for the purpose of advising with the Boards of review with respect to valuing real and personal property for assessment for taxation, shall have the power and authority to inspect, review, value and assess any property subject to taxation and such agents or representatives are authorized to fix values for assessment, subject to the approval of the Board of Review of the County in which such property is located. * * * "

"Section 73. It shall be the duty of the Board of Review to meet on the second Monday in March and sit as long as may be necessary to carefully examine and inspect all tax returns and assessments delivered to it by the County tax assessor. If the board finds that any taxpayer has neglected to make a return or has omitted from his return any property that should be returned, it shall be its duty to make up a return upon the proper blank, with a description of the property to be assessed, which property it shall then proceed to value and equalize in the same manner as other property is valued and equalized by it, and

to the value thus placed thereon shall be added a penalty of ten per cent for failure of the owner of such property to properly return the same.
* * * "

From studying the sections, supra, it is my opinion that the Legislature intended for the tax agents or representatives of the Tax Commission to serve only in an advisory capacity with the Board of Review and the Tax Assessor and it was not the intention of the Legislature to set up a dual system of tax assessment by giving the tax agents the authority to examine the records and make their own independent assessments.

If the tax agent has information that a taxpayer's property is undervalued, he should so inform the Tax Assessor and the Board of Review.

"The intention of the Legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the Court, shall by all aids available, ascertain, and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the State, to the intention or purpose of the Legislature as expressed in the statute." 59 Corpus Juris, p. 948. Street v. Coe, 207 Ala. 631, 93 So. 591; Sunflower Lumber Company v. Turner Supply Co., 158 Ala. 191, 48 So. 510.

When the Board of Review meets and considers Mr. Jones' assessment, if the Board decides that the assessment made by Mr. Jones the previous year was sixty per cent of the fair valuation of the land, then the Board should agree on the previous year's assessment, and disregard the raised valuation as placed by the tax agent.

The tax assessor acts as secretary for the Board of Review, and it is his duty as such secretary to notify a taxpayer by registered mail when his assessment has been raised by the Board of Review.

Parts of Sections 67 and 47 of the 1935 Revenue Act are as follows:

"SECTION 67. * * * the tax assessors of the several counties shall act as secretary of such board * * * "

"SECTION 47. * * * In the event the value of real or personal property of any taxpayer is increased by the Board of Review, herein created, over the assessed value thereof for the next preceding year the taxpayer shall be furnished by registered mail, return receipt demanded, or in person by the Secretary of the Board of Review, with a statement showing separately the value of his personal property and his real property, and improvements thereon, such statement to be signed by the Chairman of the Board of Review * * * "

See opinion of this office to you under date of April 9, 1936.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 7, 1936.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Counties: Gasoline Fund: Long term warrants

1. Counties may borrow money secured exclusively by the proceeds of the gasoline levied by the State and distributed to the counties, without incurring a debt within Section 224 of the Constitution.
2. The County Budget Act does not apply to such gasoline fund.
3. Counties may issue warrants payable at future date out of gasoline fund, and such warrants may or may not be interest bearing.
4. A county may incur indebtedness payable only out of gasoline fund and issue warrants therefor payable at future dates.
5. Counties may apply not in excess of one third of the gasoline tax in payment of debts created prior to March 26, 1936.
6. That the gasoline tax and proceeds of any loans secured thereby must be used exclusively in the construction, maintenance or repair of roads and bridges in the county.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your request for an opinion as follows:

"(1) Please advise me whether the Court of County Commissioners can execute and approve claims for debts that have been incurred by the County for the construction of roads since October 1, 1935, and approve these claims now for payment at a future date and provide that they draw interest to the date of payment, and is it legal for the County to pay interest on debts for road construction which have been incurred since October 1, 1935, and would such claims and interest be promptly payable out of the Gasoline Fund?"

"(2) In the event such debt was incurred after October 1, 1935 and prior to March 26, 1936, the date on which Act No. 51, House Bill 61, by Castleberry, was approved, could an approved claim be executed by the Court of County Commissioners to be paid at a future date be entitled to interest?

"(3) In the event such debt was incurred after March 26, 1936, could the Court of County Commissioners now approve such claim for payment

at a specified date in the future and to draw interest to the date of payment, and when said approved claim becomes due on the future date as set by the Court of County Commissioners, would I be authorized to draw a warrant in payment of said claim together with interest to the date of payment?

"(4) In the event the Court of County Commissioners should execute and approve such approved claims for debts created after October 1, 1935, and the Resolution of the Court of County Commissioners adopted at the time of the approval of the claim provides that I, as Chairman of the Court of County Commissioners, shall issue a warrant at the time the approved claim becomes due for payment of the claim with interest to the date of payment, would I be authorized to issue said warrant when the same becomes due together with the interest that may accrue thereon without any further order and approval of the Court of County Commissioners at the time the warrant on the County Treasury is issued?

"(5) Please advise whether a portion of the Gasoline tax can now, by resolution of the Court of County Commissioners, be set aside by the County Treasurer from month to month out of which these claims may be paid, and would such pledge of the Gasoline Tax be legal, and would I be authorized to draw warrant on such Gasoline Fund for such purpose covering the approved claims with interest to the date of payment?"

Involved in your questions are a number of questions which have been raised by other counties and which I think are necessary to a decision in your case.

1. Can a county borrow money secured only by the gasoline tax?

This question was answered affirmatively by opinion to Hon. Chas. S. McDowell, County Attorney, Barbour County, under date of November 7, 1933, Biennial Report of Attorney General, 1932-1934.

Likewise, the Supreme Court in *Re Opinions of the Justices*, 163 So. 105 in passing on Act No. 177, approved July 8, 1935, authorizing counties whose road and bridge fund equalled \$40,000 per annum, to issue interest bearing warrants, debentures or certificates or other like securities against 50% of the county's part of the gasoline tax levied by the State and allocated to the counties held that said act was a general act and that **"the warrants or other securities authorized by the bill did not constitute or evidence debts of the county within the meaning of Section 224 of the Constitution."**

Proceeding, the court said:

"They are expressly declared not to be a charge on the general credit of the county, but payable solely from the funds allocated and pledged under the act. The fund thus pledged is part of the proceeds of a state excise tax, levied and collected by the state, and allocated by statute to the several counties for the construction and maintenance of roads and bridges. *Jefferson County v. Hard, Comptroller, et al*, 227 Ala. 201, 149 So. 81.

"These obligations are not a charge on the general revenues of the county, nor on the proceeds of any levy by the county for special county purposes under the Constitution.

"Our recent decisions, construing section 225, a related section fixing debt limits of cities, are applicable in principle to section 224. *Oppenheim v. City of Florence*, 229 Ala. 50, 155 So. 859; *Smith v. Town of Guin et al*, 229 Ala. 61, 155 So. 865."

2. The passage of this Special Act naturally raises the inquiry, did the legislature intend the power therein granted to specific counties to be in derogation or a denial of such power existing in other counties not included within the authority of such Special Act?

I do not think so and such construction is opposed to the opinion given to Barbour County cited above, which opinion has not been overruled.

To the contrary, the same was in effect reaffirmed in opinion to Hon. Chas. E. Bragg, Probate Judge, Lawrence County, under date of September 26, 1936, wherein a loan of \$36,000.00 incurred or proposed to be incurred by the county prior to October 1, 1936, to be paid out of the proceeds of the Gasoline Fund was held legal.

True, certain local acts were involved in this and the companion opinion, but the indebtedness if authorized, was under the general authority, the Barbour County opinion, *supra*, being cited, and the local acts merely detailing a specific method of payment.

Moreover, it is not my opinion that a construction long acquiesced and holding a general class has certain authority is repealed by an act of the legislature granting such authority to a portion of such general class. Such an act appears to be merely cumulative. In the absence of specific language denying the power in the remaining members of the class, I am of the opinion that such authority as formerly was theirs was not affected or taken away by said Act No. 177.

3. What is the effect of the County Budget Act of 1935?

(a) In an opinion to Hon. G. H. Howard, Probate Judge, Elmore County, (mms) it was held:

"From the above provisions and from other sections of the act, it seems clear that the intent of the legislature was that the act should apply only to the general fund as far as its budget provisions are concerned."

Therefore, under the express holding of the office the budget provisions of said act do not apply to the Gasoline Fund.

(b) What though is the effect of Section 7 of said Act which provides:

"No warrant or order for money shall be issued in pursuance of authority of the Board of Revenue, County Commissioners or other like governing body until funds are available for its payment upon presentation to the Treasurer or depository. It shall be the duty of the Board of Revenue, County Commissioners or other like governing body to provide and appropriate funds for paying warrants issued upon orders drawn by other county officials in pursuance of law, which orders are not required by law to be approved and authorized by such Board."

Does this Section prevent the issuance of a warrant payable out of the Gasoline Fund at some future date, either with or without interest as the original contract may provide?

It appears to me that for all practical purposes this is settled by the opinion to Judge Bragg above cited. It was there held that a county may borrow money, secured by a pledge of the gasoline tax. This opinion was subsequent to County Budget Act, and hence it was before the office when such opinion was rendered.

The inquiry is, therefore, limited to the one question whether, if the indebtedness is evidenced by "warrants" is their issuance forbidden by said Section 7 of the Budget Act?

What is a "warrant"? In *Littlejohn v. Littlejohn*, 195 Ala. 614, it was stated:

"(1) It must be regarded as settled that the issuance by the authority of a commissioners' court of interest-bearing warrants on the county treasurer, payable at stated times in the future, to pay for public buildings, public roads and bridges, is not the issuance of bonds by the county within the provisions of section 222 of the Constitution; and that commissioners' courts are competent, unless restrained by the debt limit fixed in section 224 of the Constitution (*Hagan v. Com'rs.*, 160 Ala. 544, 49 South, 417, 37 L. R. A. (N. S.) 1027; *Gunter v. Hackworth*, 182 Ala. 265, 62 South, 101; *O'Rear v. Sartain*, 193 Ala. 275, 69 South, 554), to issue interest-bearing warrants of the character above described (*Talley v. Jackson Co.* 175 Ala. 644, 39 South, 167; *Matkin v. Marengo County*, 137 Ala. 155, 34 South, 171).

"(2,3) A county warrant 'is the command of one duly authorized officer to another, whose duty it is to obey, to pay, from county funds, a specified sum to a designated person whose claim therefor has been allowed by the court of county commissioners'. *Savage v. Mathews*, 98 Ala. 535, 537, 13 South. 328. Such a warrant has not the attributes of commercial paper, and is not assignable, so as to be made the foundation of an action at the suit of a transferee. *Savage v. Mathews*, supra.

"(4,5) As employed in Section 222 of the Constitution, the term 'bond' signifies an obligation in writing to pay a sum of money. It imports, necessarily, a promise to pay a certain sum of money at a future date, and commonly bears no specific designation of the person or entity in whose favor its promise runs. Bonds authoritatively issued by agencies of the governments are commercial paper and are capable of assignment and of transfer, and the succeeding owner may of course found an action upon it.—*Blackmon v. Lehman*, 63 Ala. 547, 550, 35 Am. Rep. 57. There is, hence, a marked fundamental difference between county warrants and the county bonds to which section 222 of the organic law makes governing reference. The fact that both county warrants and county bonds may be made presentable and payable at a future specified date, and that they bear interest for prescribed periods does not suffice to eliminate the stated characteristic distinctions between them. One, the warrant is an order to pay when in funds; while the other, the bond is a promise to pay."

The statement as to negotiability may be changed by Act No. 633 approved July 30, 1931 (Acts 1931, 772), which states:

"That all public board heretofore authorized or which may be authorized by the Legislature to borrow money be and they are hereby authorized and empowered to issue as evidence of said loans so authorized negotiable semi-annual interest bearing coupon certificates of indebtedness."

In the act discussed in **Re Opinions of the Justices**, 163 So. 105, the evidences of indebtedness are described as "county warrants, debentures, certificates or orders, or like forms of securities."

It is apparent, therefore, that the legislature did not in this act give the term "warrant" a technical significance, such as it may ordinarily have, and I think generally in this connection, it is not given a technical significance.

It is though a definite order to pay a certain amount at a definite time and contemplates that at such time, the money will be available, in the fund out of which payable, sufficient to meet same. The issuance, therefore, of warrants or other orders for the payment of money out of the Gasoline Fund, requires that the governing body make definite provision that moneys will be in such fund sufficient to pay such order when due.

Coming now to your particular inquiries, I advise if I understand the questions one, two, three and four you are primarily concerned with the right of the county to pay interest on the claims outlined in these questions. Assuming this to be correct, it is my conclusion from your letter that they all relate to claims for debts which have been incurred, and as to which, at the time the same were incurred, no agreement or contract was entered into with the several claimants, and duly entered on the minutes of the court, for the payment of interest. Upon such assumption, it is my opinion that each of said inquiries must be answered in the negative.—**Marengo County v. Barley**, 209 Ala. 663, 96 So. 753; **A. G. & A. Ry. Co. v. Gadsden**, 185 Ala. 263, 64 So. 91; **Town of Eutaw v. Coleman**, 189 Ala. 164, 66 So. 646; Opinions of Attorney General, Office Edition, Vol. 4, p. 54 (a copy of which is enclosed herewith).

It is my opinion, however, in answer to question one that if the claims were presented within twelve months after they accrued they can be allowed as to principal and paid out of the Gasoline Fund received by the County from the State.

My answer to question two is substantially the same. I am of the opinion that such claim could be approved to be paid at a future date and likewise as to question three if such claim was incurred after March 26, 1936, the Court can approve the same, payable at a future date as provided by Act No. 51 below referred to. In the opinion to Hon. Chas. S. McDowell, County Attorney, Barbour County, *supra*, it was held that the county could make loans and pledge the gasoline tax and that such would not constitute a part of the constitutional debt limit of the county. Specifically, it was stated:

" * * * I find that I am unable to say, from either the Act levying the tax, or the Act providing the method of distribution and the purpose for which it might be expended, that the Legislature restricted the Courts of County Commissioners or Boards of Revenue in the use of these funds, to an operation on a cash basis."

The Legislature of 1936 apparently recognizing this opinion and that debts had been incurred therefor, specifically authorized by Act No. 51, approved March 26, 1936, Acts 1936, page 28, the Boards of Revenue to expend not to exceed one-third of the total amount that may be received by any county from the gasoline tax in payment of any debt that may have been heretofore incurred by such county for the construction or maintenance of roads and bridges. Therefore, in answer to question five, it is my opinion that you can use not in excess of one-third of the gasoline tax received from the State in payment of these claims which were created prior to March 26, 1936.

From the foregoing I hold

(1) That a county may borrow money secured only by the gasoline tax, and issue warrants payable at future dates thereof.

(2) That such warrants may be interest bearing or non interest bearing, dependent on the contract at the time of the incurring of such indebtedness.

(3) That the county may incur indebtedness payable only out of the gasoline fund and issue warrants in payment therefor payable at future dates.

(4) That in payment of indebtedness created prior to March 26, 1936, not in excess of one-third of the gasoline tax may be used.

What I have said above does not contemplate and is not intended to authorize the present expenditure and pledging therefor the gasoline tax for an unreasonable period. It seems to me that warrants payable at future dates should be payable within a reasonable time, generally to be gauged by the time required to complete the project, for which the expenditure was made.

Likewise, it would appear that reasonable amounts for maintenance of roads and bridges, a necessary current expense, should always be provided for, over and above the long term outlays for construction.

It is needless of course to state that all gasoline money or the proceeds of loans secured thereby must be used for the construction, maintenance and repair of roads and bridges in the county.

I think further that where a claim is allowed by the commissioners' Court, the minutes should show that warrant, payable on a certain date (if not immediately payable) is ordered to be issued.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 7, 1936.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

County Financial Control Act—

Act No. 397 H. B. 191, 1935 Acts, page 803, does not include gasoline fund under its budgeting provisions.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of November 19, 1935, in which you request my opinion as follows:

1. In view of Act No. 379, H. B. 191, approved September 9, 1935, known as the "County Financial Control Act", can a county pledge or issue postdated warrants against the proceeds of its share of the gasoline tax levied by the State?
2. In view of Act No. 379, H. B. 191, approved September 9, 1935, known as the "County Financial Control Act", can a county, which collects as much as \$40,000.00 per annum from the road and bridge tax, legally pledge or issue postdated warrants against as much as fifty per cent of the proceeds of its share of the gasoline tax levied by the State, said pledging or issuing of postdated warrants being authorized under the provisions of Act No. 177, S. B. 184, approved July 8, 1935, for such counties?

Your inquiry involves the question of whether the County Financial Control Act in reference to its budgeting provisions applies to the gasoline fund. I am of the opinion that this Act applies only to the general fund as to the budget provisions.

While Section 2 of the Act uses the term "all", this is in the statement of purpose of the Act and the actual provisions in reference to the duty of the Board mention only the general fund. This is part of Section 3 and reads as follows:

"Section 3.—Annual Budgets.—It shall be the duty of the Board of Revenue, County Commissioners or other similar governing body of the Counties, by whatever name they bear, at some meeting in September of each calendar year, or not later than their first meeting in October following, to prepare and adopt an estimate of the income of the county for the fiscal year beginning on October first of the current calendar year, for what is known as the general fund, under their supervision and control; and to estimate for the same fiscal year the expense of operations, and to appropriate for the various purposes the respective amounts that are to be used for each of such purposes." (Underscoring supplied)

Again in Section 6, the Legislature indicates that the Act applies only to the general fund:

"Section 6—Disposition of Balances. At the end of every fiscal year any unexpended balances, remaining in the **general funds set up under the provisions of this Act** shall go forward into the general fund of the succeeding year; and such balance or balances shall constitute a part of the income available for such fiscal year, and be handled, appropriated and disbursed as any other income for that year." (Underscored supplied)

Under the heading "Registration of Old Warrants", Section 10, the Act provides:

"The Board of Revenue, County Commissioners or other like governing body, shall by notice published in some newspaper published in the county, if any, and if not then in some newspaper published in an adjoining county, call in for registration anew all warrants and certificates of indebtedness **payable out of the general fund**, other than bonds, which are past due and remain unpaid at the time this Act becomes effective." (Underscored supplied)

From the above provision and from other Sections of the Act, it seems clear that the intent of the Legislature was that the Act should apply only to the general fund as far as its budget provisions are concerned.

When the legislative intent is clear, it must be given effect. As was said by the Special Supreme Court of Alabama in the case of *Abramson v. Hard*, 155 So. 590, at page 593:

"In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the legislature. As has frequently been stated in effect, the intention of the legislature constitutes the law". 25 R. C. L. p. 960.

"In 25 R. C. L. p. 967, it is said: 'It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which, as we have seen, is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed. Hence, the courts have not always confined to the literal meaning of a statute; the real purpose and intent of the legislature will prevail over the literal import of the words. * * *'"

Further, the Act specifically exempts bonds and school funds (Sections 12 and 13). In the interpretation of the *State Budget Act*, in which exceptions were made after the use of the word "all", the Court said:

"It is, of course, a well-settled general rule of construction that where the language of a statute is plain and unambiguous, it should be given the meaning therein plainly expressed. Relying upon this rule, appellants contend that the use of the inclusive expression 'all appro-

priations', in section 19 of the aforesaid act, expresses the plain and unambiguous intent on the part of the Legislature to require that all appropriations of every kind and character, other than those therein specifically excepted, shall be prorated in the event the revenues of a given year are not sufficient to pay all. But manifestly this is not true, for other provisions of the same act demonstrate that it was not intended as claimed that 'all appropriations' of every kind shall be so prorated.' *Abramson v. Hard*, supra.

I am of the opinion, therefore, both from the actual wording of the Act and from the reasonable interpretation of its provisions, that as to budgets it applies only to the general fund.

In answer to your inquiry in reference to issuing warrants, I enclose copy of opinion addressed to Hon. N. P. Tompkins of this date which discusses this matter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 23, 1936.

Hon. E. S. Tunstall,
Tax Assessor, Baldwin County,
Bay Minette, Alabama.

Board of Review has right to review information assessments made by the Tax Assessor but has no authority to review escape assessments.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of September 23, 1936, in which you state:

"Please advise me whether or not the Board of Review has a legal right under the 1935 Revenue Act to reduce a valuation on an assessment copied or assessment made as an information assessment, that is, where the taxpayer fails to assess and the assessor picks the assessment up as a copied or information assessment.

"The question is whether the taxpayer fails to make the assessment and after the same was picked up as an information assessment could he avail himself of the right to appear before the Board of Review as the right given him in case he assessed and swore to the assessment. Of course I understand he could not be entitled to appear before the Board in any event unless the protest was filed legally."

In reply, I beg to advise that Section 67 of the 1935 Revenue Act provides in part that the Board of Review shall "inspect, review, revise and fix the value of all the property returned to or listed with the Tax Assessor for taxation for each year." And Section 50 provides for the delivery by the Tax Assessor to the Board of Review not later than the second Monday in March of his completed assessments.

It is, therefore, my opinion that the Board of Review has a right to review **information** assessments made by the Tax Assessor and to review the same as fully where proper protests are made in cases where returns are made by the taxpayers.

However, the foregoing does not apply to "escape" assessments. The review of "escape" assessments is to be made by the Assessor himself and from his action there is an appeal to the Circuit Court as is provided in detail by Section 45 of the Revenue Act of 1935.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 26, 1936.

Hon. B. H. Baker,
Clerk, Circuit Court,
Barbour County,
Clayton, Alabama.

The Act of the Legislature approved March 26, 1936, is effective in cases appealed from the County Court to the Circuit Court on the conviction of the defendant in the Circuit Court and not on the date of the affirmance of the case in the Court of Appeals.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 23, 1936, in which you request my opinion as follows:

"A person who was convicted of a misdemeanor in the County Court of this County appealed his case to the Circuit Court of this County where he was again convicted. The date of conviction in the Circuit Court was prior to the passage of the Act relieving a party of the payment of a solicitor's fee in the Circuit Court in addition to the one imposed in the County Court, but the party appealed from the Circuit Court to Court of Appeals of Alabama where the case was affirmed but after the passage of the Act described above.

"In this particular case, the conviction in both County and Circuit Courts were had before passage of Act, but affirmance of Court of Ap-

peals was had after passage of the Act, does this party have to pay the solicitor's fee in both County and Circuit Court or only the one in the County Court."

In answering your request, I call your attention to an Act of the Legislature approved March 26, 1936, (General Acts 1936, p. 30) which is as follows:

"Section 1. That Section 3759 of the Code of Alabama of 1923, be amended so as to read as follows: Section 3759. For every conviction for a misdemeanor in the County Courts or Inferior Courts there shall be taxed and collected as a part of the costs and paid into the County Treasury the same Solicitor's fees provided for conviction in such cases in the Circuit Court, provided that in the event of an appeal to the Circuit Court no Solicitor's fees shall be taxed or collected for the services of a Solicitor in the Circuit Court."

In connection with this matter, I also call your attention to Section 5512, Code of Alabama, 1928, (Michie), which is as follows:

"5512. SOLICITORS' FEES IN COUNTY COURTS: HOW TAXED AND COLLECTED.—For every conviction of a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitors' fees provided for conviction in such cases in the circuit court; and said fees shall be placed in the solicitor's fund of each county by the treasurer of said county; and on appeal to the circuit court, the same shall be taxed as a part of the costs in addition to the solicitors' fee taxed for such conviction in the circuit court, and this solicitors' fee previously taxed in the county court or inferior court, shall be paid, when collected, into the county treasury, and placed in the solicitors' fund of such county by the treasurer of said county."

The Act of 1936, supra, changed the law as to fees of county solicitor earned in the County Court as regulated by Section 5512 of the Code, supra. The Act of 1936 provides that where there is an appeal from a conviction in the County Court to the Circuit Court, and the conviction is had in the Circuit Court no solicitor's fee for the Circuit Court can be charged, changing materially the provisions of Section 5512, but there is no repealing clause in said Act. Now the question presents itself: Does the 1936 Act, supra, repeal Section 5512 of the Code as to this provision? We think it does for the reason it is a later enactment, and, therefore, it repeals by implication that part of Section 5512 which refers to the collection of a Circuit Solicitor's fee in the Circuit Court.

Now we come to the real question in your request, that is, when does the Act of 1936 become operative in cases in the Circuit Court which were appealed from the County Court on conviction had before the passage and approval of the Act of 1936, supra, and which were appealed to the Court of Appeals and affirmed after the approval of the Act. It is my opinion the Act of 1936, above quoted, did not affect the case you detail above, as the conviction was had before the approval of the Act. I do not think the date when the case was affirmed in the Court of Appeals makes any difference. The date of the conviction must govern. In other words, the Act cannot be construed to be retroactive.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 27, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. County Board of Education—may pay reasonable traveling expenses of supervisor, authorized to furnish supervisor or attendance officer with automobile as a part of salary contract, and to pay traveling expenses of attendance officer.

2. Schools—Erection, Equipment and Repair Fund should be used for purchase of equipment for school building if sufficient therefor.

Opinion by Assistant Attorney General Small.

Dear Sir:

Receipt is acknowledged of your request for opinion of recent date, as follows:

“(1) Is there legal authority for the County Superintendent of Education to furnish supervisor and attendance officers with automobiles and the upkeep of same and if so, from what fund?”

“(2) When Erection, Repair, and Equipment accounts show balances, is it legal for school equipment to be bought from the General School Fund?”

In reply, I wish to advise that this office in an opinion addressed to you under the date of August 19, 1935, written by the Attorney General in substance held that County Boards of Education have authority under general law to fix in their discretion the contract of employment of the County Superintendent of Education, and such Boards also have authority to provide expense accounts.

In my judgment, if the County Board of Education can exercise this authority in fixing the contracts of employment for Superintendents of Education, under the general law the same principle is applicable to the instant situation.

Section 169 of the School Code provides:

“The County Board of Education may in its discretion provide upon the nomination of the County Superintendent of Education, at least the following assistants: an elementary school supervisor and a statistical and stenographic clerk. No person shall be eligible for appointment as such supervisor who does not hold a certificate of administration and supervision as required of County Superintendents of Education. The County Board of Education may employ additional clerical and professional assistants, including health supervisors and may reimburse them for actual traveling expenses necessary in the performance of

their official duties. The County Superintendent is hereby required to maintain an office at the County Seat. The County Board of Revenue or Court of County Commissioners shall provide the County Superintendent of Education and his professional and clerical assistants with ample, convenient and comfortable office quarters. The County Board of Revenue or Court of County Commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the County Superintendent of Education and his assistants."

This Section authorizes the employment of the School Supervisor and attendance officer and provides for the payment of traveling expenses, which in my judgment must be paid from the fund from which the salary is paid. Section 318 of the School Code provides:

"The attendance officers who are employed by the County or City Board of Education shall be paid by the respective boards of education such salaries as may be required to secure efficient service. Said attendance officer shall be paid as other employees of the County or City Boards of Education are paid, but no attendance officer shall receive any compensation under the provisions of this Code until he shall have filed such reports as are required by the State Board of Education, and by the Board of Education of the County or City employing him."

Under the terms of this section, in my judgment, the compensation contract is a matter that addresses itself to the discretion of the County Board of Education, limited only by the term "such salaries as may be required to secure efficient service."

In my judgment, if the County Board of Education should deem it advisable and for the best interests of the County to include as a part of such salary contract a car for the performance of the services of the School Supervisor or attendance officer then the same could be provided as a part of the salary payable and as consideration for the services to be rendered under the contract of employment.

Under the above circumstances, of course, the car would constitute a part of the salary contract and should be paid for from the same fund as the salary is paid. It must be clearly understood, however, that the salary contract is entirely separate and distinct from the traveling expense allowance here considered.

Answering your second inquiry, it is my opinion that equipment should be purchased, in so far as practicable, from the Erection, Repair and Equipment Fund, provided by Section 370, et seq of the School Code of 1927.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 27, 1936.

Hon. E. J. Harris,
Tax Assessor,
Lawrence County,
Moulton, Alabama.

Land assessed to the Resettlement Administration not taxable.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 25, 1936, in which you request my opinion as follows:

"Please advise me whether or not land assessed to the Resettlement Administration is taxable or not."

In my opinion, land assessed to the Resettlement Administration cannot be taxable. Investigation reveals that the Resettlement Administration is a Federal agency organized by Presidential Proclamation issued under authority of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11). As such, therefore, it would come under the well recognized rule, originally announced in the epic case of *McCullough v. Maryland*, 4 Wheat. (U. S.) 316, that a State may not tax an instrumentality of the Federal Government.

It is, therefore, my opinion that the land assessed to the Resettlement Administration is not taxable.

The foregoing conclusion are, of course, based on the premises that the lands in question were **lawfully** acquired by the Resettlement Administration under constitutional authority.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 27, 1936.

Hon. R. H. McAnelly,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Counties—May refund warrants issued prior to October 1, 1935, although the due dates of same are after October 1, 1935, under the provisions of Act No. 379, H. 191, approved September 9, 1935, (Acts 1935, p. 803) known as the County Financial Control Act.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 22, 1936, which is as follows:

"There are several obligations of this county which are past due, and claims of various kinds which have been renewed and are coming due soon, and which the General Funds of the county will not be sufficient to allow them to be included in the budget for next year. On account of the maturity date of several of the largest obligations, seems the 'County Financial Control Act' might prohibit the refinancing of an amount sufficient to relieve the 1937 Budget of an over burden. I'm giving you below a list of warrants and accounts which we would like to re-finance and which it seems very necessary that the County refinance at least \$20,000.00 or if possible \$25,000.00. Please look over the items and dates and give me your opinion as to what claims we might include in a 'Refinancing' program.

Dates	Warrant	Account	Date due
1/14/1935	\$ 13,000.00		1/ 5/1936
1/14/1935	1,711.00		2/ 1/1937
1/14/1935	1896		2/ 5/1936
9/23/1935	425.00		2/ 1/1936
1/23/1936	2,886.00		1/ 8/1937
1/23/1936	6,000.00		1/22/1937
		\$ 342.00	1934
		670.00	10/1/1935 Due Madison

Co. \$262.00 of a \$446.00 account was contracted before Oct. 1st, 1935.

"Your ruling and advice as to which of the claims recited above may be included in the refinancing to be done in this County, will be very much appreciated."

In answer to your inquiry, I am of the opinion warrants validly issued against the general fund that were issued prior to October 1, 1935, although the due date is after October 1, 1935, may be refunded under the provisions of Act No. 379, H. 191, approved September 9, 1935 (Acts 1935, p. 803) known as the County Financial Control Act. Those warrants issued for debts incurred after October 1, 1935, are not subject to refund.

Section 9 of the Act above cited provides in part as follows:

"Section 9.—SHALL REFUND OUTSTANDING WARRANTS. It shall be the duty of all Boards of Revenue, County Commissioners and other like governing bodies of the counties to refund all warrants, which are unpaid and past due at the time this Act goes into effect, and for which there is money available at that time. * * * "

In construing this section relative to temporary loans made prior to October 1, 1935, but due after October 1, 1935, this office held that same could be refunded.—**Opinion of Attorney General to State Comptroller, August 7, 1936.** Reasoning by analogy, the same principle would apply to general fund warrants legally issued prior to October 1, 1935, for outstanding debts although not due until after October 1, 1935. Therefore, such warrants may be refunded under the provisions of the County Financial Control Act, supra.

Those warrants issued for debts incurred after October 1, 1935 may not be refunded. In this connection I wish to refer you to an opinion of this office rendered to the Chairman of the Board of Revenue of Walker County on July 7, 1936, a copy of which is herewith enclosed, and to Quarterly Report of Attorney General, Vol. II, p. 138.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 27, 1936.

Hon. W. H. Quillin,
Judge, Law and Equity Court,
Franklin County,
Russellville, Alabama.

Fine and Forfeiture Fund—

Fine imposed upon party arrested for public drunkenness should be paid into Fine and Forfeiture Fund even though party arrested by Highway Patrolman.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 7, 1936 in which you request my opinion as follows:

"A highway patrolman arrested a person on the public highways of Franklin County while driving an automobile while under the influence of intoxicating liquor. The officer arresting said person commenced a criminal prosecution against him by making an affidavit before the Clerk of the Law & Equity Court and a warrant of arrest was issued on said affidavit. The affidavit or complaint charged this person with driving an automobile while under the influence of intoxicating liquor.

"When this case was called for trial the Solicitor who prosecutes for the state, with the consent of the defendant, amended the affidavit by adding count two charging the defendant with public drunkenness. The defendant pleaded guilty to count two of the affidavit charging public drunkenness and the court fixed his fine at \$25.00 for public drunkenness.

"Does the \$25.00 fine go to the fine and forfeiture fund of the county or does the \$25.00 fine go to the funds of the State Highway Department? Please advise me just where the \$25.00 fine goes to?"

In my opinion, the \$25.00 fine which you mention in your letter should be remitted to the Fine and Forfeiture Fund of the county and not to the

State Highway Department. Section 80 of the act creating the Highway Patrol and the Highway Patrol Fund (General Acts 1935, pages 756, 759) provides that:

"Fines and Forfeitures imposed upon persons violating the provisions of this act shall be rendered into the said Highway Patrol Fund by the officers of the several courts."

The offense of "Public Drunkenness" is not mentioned in the Highway Patrol Act, supra, nor is it to be found in the Rules of the Road, promulgated by the State Highway Department of Alabama under authority of the Alabama Highway Code (Act No. 58 of General Acts of Alabama 1932). It appears then that the fine in question was not imposed for a violation of the provisions of the Highway Patrol Act, and I, therefore, advise you that the \$25.00 should be paid into the Fine and Forfeiture Fund of the County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 28, 1936.

Hon. J. G. Pinson,
County Superintendent of Education,
Coosa County,
Rockford, Alabama.

School Depository—Under facts stated Alexander City Bank may be paid out of the Minimum Program Fund for clerical assistance in handling school funds.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of September 30, 1936, in which you state:

"1. L. M. Willis, Vice-President of the Alexander City Bank, was duly appointed and bonded as Treasurer of School Funds—later under the new law, as Custodian of School Funds—for the Coosa County Board of Education. He was appointed to serve until September 30, 1936. The minutes of the County Board of Education for the meeting at which he was appointed, carry a resolution adopted by the Board, providing that the Alexander City Bank should be Depository, and should be placed on the payroll in the amount of \$37.50 per quarter for clerical assistance; the same to be paid from the Bonus Fund.

"2. The Bonus Fund ceased to exist as a separate Fund when the Minimum Program went into effect, October 1, 1935. I wish to know if it

is legal for the County Board of Education to pay the Depository Bank for said clerical assistance according to the contract mentioned above for the year, 1935-36, out of funds now held by the Custodian of School Funds as a surplus from the proceeds on State Warrants issued to the County Board of Education by the State in 1933, since the Certificates of Indebtedness from the State to the County Board of Education which these Warrants redeemed, included a certificate of indebtedness for the Bonus Fund?

"3. If not, can the amount of this contract made by order of the County Board of Education be paid from any other funds?

"4. I might add that certainly at the time this contract was made, it was exceedingly difficult to secure a Depository for School Funds, and my efforts at the time convinced me that one could not be obtained without this payment for expense for clerical service."

In my opinion the County Board of Education may pay the Depository Bank for said clerical assistance according to said contract for the year 1935-36 out of the Minimum Program Fund.

This office has previously ruled that the Bonus Fund may be used to compensate a bank for clerical work in handling a school treasurer's account when it is necessary to use the same to furnish a place in which public school funds would be safe.

See Biennial Report of Attorney General, 1930-1932, p. 568.

The appropriations which had heretofore been made to the Bonus Fund were taken from said fund and paid into the Minimum Program Fund by the passage of Act No. 326, H. B. 945, approved September 2, 1935 (General Acts 1935, p. 75) which provides in part as follows:

"Section 3. MINIMUM PROGRAM FUND.—That in addition to all other moneys appropriated for the public elementary and high schools of the State, there is hereby appropriated to the State Board of Education out of any funds in the treasury not otherwise appropriated for the fiscal years ending September 30, 1936, September 30, 1937, September 30, 1938 and September 30, 1939, the following sums which in accordance with the statutes and the regulations of the State Board of Education relating to the expenditures of such fund, shall be used for providing a minimum term and for the equalization of educational opportunity in the public schools of the State: a. The following funds and appropriations are hereby consolidated with and made a part of the minimum program fund and henceforth shall be included as a part of the minimum program appropriation: * * * (5) The appropriation previously known as the Bonus School Fund, amounting to \$268,000 annually. * * * "

As it was necessary at that time to have a bank act as the Custodian of the School Funds, and in your letter you state that you could not obtain one without agreeing to compensate the bank for clerical help, in my opinion you were justified in entering into the contract with the Alexander City Bank, and the payments for clerical assistance should be paid to the Bank from the Minimum Program fund.

Section 2 of Act No. 295, H. B. 852, approved September 2, 1935 (General Acts 1935, p. 714) provides in part as follows:

"Section 2. PURPOSES AND PLAN OF APPORTIONMENT.—In addition to all other appropriations and apportionments of public school money now provided by law and made available for elementary and high schools there shall be apportioned and paid to county boards of education from the Minimum Program Fund the amounts to be determined as hereinafter provided and in accordance with regulations of the State Board of Education. This Minimum Program Fund shall be used principally (1) to aid in providing at least a seven months' minimum term for all schools, and (2) to assist in the promotion of equalization of educational opportunity for all children in the public elementary and high schools. * * * "

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 29, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Where witness summoned to appear in more than one criminal case in one day, he is entitled to claim and receive his fee where payment is available in every case where he proves attendance.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 9, 1936, in which you request my opinion as follows:

"Regarding witness fees in Criminal cases where witness appears in more than one case on the same day, I am familiar with the following opinions that your office has rendered in connection with Section 3770 of the 1923 Code of Alabama.

"Page 306—Biennial Reports for 1926-1928

Page 401—Biennial Reports for 1928-1930

Page 136—Biennial Reports for 1930-1932.

Opinion to Hon. J. B. Hilliard, Clerk, under date of June 14, 1935.

Opinion to Hon. Cecil Deason, Solicitor, under date of December 13, 1935.

"These opinions appear very technical in their construction and after having read the five of them, there is still uncertainty in the minds of the clerks of the Criminal Courts here as to their exact application.

"The confusion in the minds of the clerks seems mainly to be caused by the requirement that the witness make a separate 'election' as to what case he is claiming his fee in. According to these various opinions and the construction of the law placed in them, based on the wording of Section 3770, a witness to the writer's mind would be doing the equivalent of 'electing' to claim his fee when, after the disposition of a case, he proves his attendance.

"The trouble in the minds of all of us in connection with these previous rulings is the general thought that the law is held to mean a witness must go to the clerk at the commencement of any day's session of the court and where he has been subpoenaed to appear in more than one case, he must tell the clerk that he wishes to select such and such a case in which he wishes to choose to claim his first witness fee. Then, if that case is not reached that day, and although the witness testifies in several other cases on the same day and final determination and disposition is made of all the other cases, due to the fact that the case he had 'elected' to choose his fee in had not been disposed of, he would not be entitled to claim any fee in any of the other cases.

"Under the laws setting out the costs to be taxed against a defendant in a Criminal case, it is the duty of the clerk to include the costs account of any State witnesses that have been subpoenaed. If these witnesses subsequently do not prove attendance, there are local and general laws that direct what shall subsequently be done with any witness fees collected by the clerks that are not claimed and paid out to the witnesses to whom they are due. Primarily, I think that it is generally agreed that a witness fee is taxed against a defendant for the benefit of the witness himself. The laws even go so far as to provide that in the event a defendant is not convicted and, consequently, if no costs are collected from him, the clerk in counties where such a fund is maintained, may thereupon so endorse the facts upon a witness' certificate and he can collect his fee from the County Fine and Forfeiture Fund. Of course, there are various provisions in the different counties effecting the payments of witness fees, and in Jefferson County witnesses for the State in the Circuit Court can, after having proved their attendance, take their witness claim to the County Treasurer and immediately collect their fee, which is paid out of the County General Fund, even though the case may not have been finally disposed of that day and is continued to another session of the Court. Of course, that would not apply if the case is continued from day to day and is in the process of being tried continuously. In the Jefferson County Court of Misdemeanors, the law provides that a witness shall be entitled to the same witness fee as is provided for the County courts of the State. This particular Court also has a provision that if a witness does not claim his fee within six months after it has been collected by the clerk, then the clerk is to turn it into the General Fund of the County.

"Using the Jefferson County Municipal Court along with the above mentioned constructions of Section 3770 of the Code and presuming that a witness had to select (before any cases were tried on a given day and where he had been subpoenaed to testify in more than one), what case he would claim his attendance fee in, on account of the system of operation of this Court, it would be practically impossible for a witness to have any idea as to what cases would be reached or what cases tried, or what cases would be tried first. There is no docket set in the regular sense of this Court for the use and guidance of the Judge

and the Solicitor determines what cases are to be considered by reference to the affidavit and warrant of arrest. He brings these to Court in his pocket and shuffles them all around before and during the Court and as he calls a certain case, he lays before the Judge the affidavit and warrant of that particular case and it is from this information that Judge Abernathy conducts the hearing. The judge then gives the affidavit and warrant of arrest to his clerk and directs the clerk to write on the warrant whatever order the Court determines for that particular case..

"In the Circuit Court here, two, three and sometimes more different judges will try criminal cases on the same day. One judge will sound the docket and assign the cases that are ready to the various other judges, including himself. From this system, it would be impossible for a witness to be able to go to a clerk before the court started on any given day and know what case he would be best protected in to choose or 'elect' to choose his fee.

"It is the writer's opinion that inasmuch as the defendants are taxed with the cost including witness fees in every instance, Section 3770 of the Code contemplates that a witness is entitled to prove his attendance and claim a fee in every case he has properly appeared in, provided he makes his claim within the time limit prescribed by law. In the above referred to Jefferson County Municipal Court, a witness cannot collect his fee from any source unless the defendant pays off. I do not think the laws ever contemplated that a witness fee should be taxed against a defendant for the benefit of the County. Yet, that is what is happening in this Municipal Court here where a witness has testified in several cases on the same day and the clerk has not paid him a fee but in one case.

"If your previous ruling would be clarified to the extent of holding that a witness could claim his fee or 'elect' to choose the case he was claiming it in, in all cases where he was duly subpoenaed and testified and where those cases were disposed of, even though they had been several in number on the same day, this writer believes it would be clearer for the clerks and still carry out the intent of Section 3770. In other words, if it can be directly stated that in every case where a witness proves his attendance he is entitled to claim and receive his fee, where payment is available. I am sure that it would clear the matter up. Under Section 3769 of the Code the law clearly makes it a duty of the clerks of the various courts to issue a witness certificate to each and every witness appearing on the part of the State. It seems clear to me that when you consider Section 3770 in its proper connection with Section 3769, that the clerk has no discretion but to certify to each and every witness who properly proves his attendance that he is entitled to such and such a fee as evidenced by the witness certificate that the law directs he must give to the witness.

"From the fact that there have been several rulings made on the matter of witness fees in Criminal cases and from the further fact that there is still confusion as to the exact construction of the laws pertaining to these fees, may I respectfully request that you give this letter your earliest attention and render an opinion that will eliminate any uncertainties or technical consideration in connection with a witness being able to claim and collect as many fees as there are different cases in which he may be summoned to appear."

It appears from your letter that the confusion arising from the opinions set forth therein centers around a construction of the term "select" or "elect" found in Section 3770 of the Code of Alabama of 1923. This section provides as follows:

"FEES OF STATE WITNESSES WHEN SUBPOENAED IN MORE CASES THAN ONE.—A witness for the state, attending in more criminal cases than one at the same time, shall only be entitled to fees in one case, to be selected by him while so attending; but if after the case in which he elects to claim his fees is disposed of, his attendance is required in the other case or cases, he shall, for such attendance, be entitled to claim his per diem in such other case, or, if more than one, in the one in which he may then elect to claim his fees; and so on until all the cases in which he is required to attend are disposed of by trial, continuance, or otherwise."

In my opinion, the terms "select" or "elect" refer to the presentation by the witness of his proof of attendance to the Clerk of the Court in which he has served as a witness.

The primary purpose of the statute (Section 3770, *supra*) to prevent the witness from being entitled to multiple pay for the single service. Thus, if three cases are set for trial upon the same day and the same witness is summoned in each of them, if the first case is disposed of upon that day, and the witness is discharged; and the second case is disposed of on the same day, and the witness discharged; and the third case is disposed of on the same day and the witness is discharged, he may claim per diem and mileage in the first case, and per diem only in the other two cases. Of course, he must have elected, as that term is hereinabove defined, while in attendance upon the court to claim his fee in the first case before he actually served as a witness in the second case. To hold otherwise would be to allow the witness to serve in two or more cases and await disposition of all before making his election as to which he shall charge his fees. However, if he is summoned as a witness in three cases set for the same day and they are continued from day to day so that at the time he is discharged as a witness from the first case which is disposed of, more than one day's attendance has accrued, he must make an election as to which of the cases he will claim mileage and attendance for the previous days awaiting call as a witness; and, having so elected, the subsequent attendance in the next case called can only be allowed for the time for which he was not compensated in the case in which he elected to claim his compensation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 3, 1936.

Hon. G. D. Byars,
Sheriff, Lawrence County,
Moulton, Alabama.

An officer without a search warrant may search a vehicle which he has probable cause for believing contains prohibited liquors, but

such probable cause must arise from the facts and circumstances known or made known to him.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please give me a ruling as to whether I must have a search warrant to be able to search a suspicious car for whiskey. I do not wish to impose on all cars but there are several that I know to be hauling liquor regularly, and I do wish to dent their activities."

In answering your request, I call your attention to the case of *Tranum v. Stringer*, 216 Ala. 522, 113 So. 580. This case is an action of damages against Tranum who was at the time a Deputy State Law Enforcement Officer. Justice Bouldin, in rendering the opinion of the Court, held:

"An officer may lawfully, under Const. U. S. Amend. 4 (Const. Bill of Rights Ala. 1901, Section 5), search an automobile on the public highways without warrant where he has probable cause for believing that it contains contraband or intoxicating liquor."

But there is a distinction between probable cause for believing and just simply believing. On this phase of the case Justice Bouldin has this to say:

"The measure of legality of a search of an automobile on a public highway without warrant by a prohibition officer under Const. U. S. Amend. 4, or Const. Bill of Rights Ala. 1901, Section 5, is whether the officer has reasonable or probable cause to believe the automobile contains liquor being illegally transported."

Therefore, my opinion, based on the case cited above, is that an officer may search a vehicle for prohibited liquors where he has reasonable or probable cause for believing such vehicle contains prohibited liquors, but this must be based on such facts as would warrant a reasonably prudent man to act. This simply means that a mere belief is not sufficient. Such a belief with nothing more is a mere guess which would not justify the officer in making the search. The two above quoted paragraphs from Justice Bouldin's opinion was based on the Federal Constitution and Bill of Rights, but he winds up his opinion with the following conclusion:

"We conclude that under the Constitution and laws of Alabama the sheriff and other law enforcement officers have the same authority to search automobiles without warrant as federal enforcement officers all subject to the rule of probable cause as above defined."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 3, 1936.

Hon. C. W. Marsh,
Treasurer, Choctaw County,
Butler, Alabama.

County Financial Control Act.

1. No department or agency of the county can, in any fiscal year, incur obligations in excess of the amount allotted to that department by the county governing body in its budget for that fiscal year.
2. The county governing body of a county may, from time to time, as conditions require, revise its budget for the fiscal year.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 4, 1936, which follows:

"Under the County Financial Control Act the Board of Commissioners of Choctaw County set up the amounts for the budget, for the different officers, as best they could, based upon the estimates furnished by each officer for his particular department. As this is the first year to be upon a budget system, naturally some of the amounts allowed are too small while others are too large. Please therefore advise me if, as County Treasurer, I can use the amounts left over from some whose allotments were large, to furnish paying claims for those whose allotments were too small? That is, may I allow some departments to **go over**, provided the grand total of the budget as adopted does not exceed the amount allowed for everything?

"Under Section 14, of the Act, it would appear to me that any department that will exceed the amount allotted to it by the Board, cannot be allowed to go over, on the other hand it appears that if the Board of Commissioners set an allotment so low that some County Officer will have to be deprived of some of his salary on account of having to have a certain amount of supplies for his office, in order that he might carry on the work of the said office, that some arrangement should be provided to take care of his salary, especially in those cases where the officer asked for more than the Commissioners allowed him. To illustrate, the Tax Assessor has to have certain necessary supplies and has to have certain plat books, etc. made in order to carry on the work of his office. His estimate was cut low by the Board of Commissioners and as a consequence he cannot pay for the necessary things for the operation of his office if there is no provision for him to exceed the amount allotted to him."

It is my opinion that a department or agency of a county cannot incur an indebtedness during a fiscal year in excess of the amount allotted to that department or agency in the budget for that fiscal year which is made by the county governing body in accordance with the provisions of Act No.

379 (General Acts, 1935, page 803, approved September 9, 1935), which is probably known as the Lee County Budget and Financial Control Act. Section 14 of this Act reads as follows:

"Section 14. OFFICE SUPPLIES AND EX-OFFICIO FEES. It shall be the duty of every County Official who is authorized by law to purchase supplies for the use of his office, and every County Official who is entitled under the law to receive from the county what is known as ex-officio fees, to prepare and submit to the Board of Revenue, County Commissioners, or other like governing body, at or before the meeting of such Board at which the County Budget is adopted, and estimate of the amount necessary to be spent by him for office supplies, and the amount estimated by such official as will be due such officer as Ex-Officio fees, during the following fiscal year. And such Board of Revenue, County Commissioners or other like governing body shall examine into such estimates and pass upon them, allowing therefor such amounts as to such board may seem to be proper for the purpose, or purposes mentioned herein. And no obligation incurred by such officer over and above the amount or amounts approved by such Board and appropriated therefor shall be an obligation of the County."

I call your attention particularly to the last sentence of the above quoted Section of this Act which provides that no obligation incurred by such officer over and above the amount or amounts approved by such board and appropriated therefor shall be an obligation of the county. This provision is very clear to the effect that no officer, department or agency can incur an indebtedness during any fiscal year in excess of the amount or amounts allotted to it by the county governing body in its budget for that fiscal year.

However, there is nothing to prevent the county governing body from revising its budget from time to time as conditions may warrant. In an opinion of this office rendered to Hon. Roy Sanderson, Judge of Probate, Marion County, Alabama under date of May 8, 1936, the Attorney General spoke as follows in the last paragraph thereof:

"I have carefully examined said Act and find nothing therein that would prevent a withdrawal and/or reappropriation of funds. The Act requires the Court of County Commissioners, not later than its first meeting in October of each year, to make an estimate of the income for the general fund for the fiscal year beginning October 1st and to estimate for that same fiscal year the expense of operations, and to appropriate for the various purposes the respective amounts that are to be used for such purpose; but there is nothing in the Act that prevents said body from revising its estimate of the income or its estimate of the expense of operations or the appropriations made for the various purposes at a later date. As a matter of fact, such a revision will also invariably be necessary. In my opinion the only limit placed by the Act, supra, on the power of the governing body to make appropriations for valid and legal purposes is the provision in Section 3 of said Act which declares that the total of appropriations made for all purposes shall not exceed the total income of the county available for appropriation."

I enclose a copy of this opinion for your information.

In accordance with the statements in the opinion above referred to and quoted from, it is my opinion that, should your governing body find that, in

its budget for this fiscal year, it has made an appropriation to some departments or agencies which are too large and that it has made appropriations to other departments or agencies which are insufficient, it could revise its budget and reappropriate the amount to these different departments or agencies which it deems necessary. In this manner, if the governing body found that a particular department or agency had had too large an amount appropriated to it and that another department or agency had had an insufficient amount appropriated to it, it could make a readjustment of its budget, taking away from the one department or agency that portion of its appropriation which it deems to be in excess of the amount which that department or agency needs and could use this amount to supplement the appropriation of the department or agency, whose appropriation is deemed insufficient. In this manner, no unnecessary hardships would be worked on any department or agency. As also stated in the opinion to Judge Sanderson, supra, such a revision of a budget will almost invariably be necessary. A budget is based on estimates of both the income and the outgo and therefore cannot be made with absolute certainty. So, for the various departments or agencies effected thereby to function properly it becomes necessary for this budget to be revised from time to time, as it is found the actual income and outgo varies from the estimates of the income and outgo at the time the budget was originally made.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 4, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Courts of County Commissioners—

Authority to Compromise claims—

Under Acts 1933, page 201, the Court of County Commissioners has no authority to compromise claim of county against officer thereof unless the same be of "doubtful validity".

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"On December 17, 1935 you rendered an opinion relative to sub-section 11 of Section 6755 of the Code of 1923 as amended by Acts 1933, page 201, Act No. 184.

"In this opinion you stated that the Commissioners Court had authority to compromise amounts charged to officials by Examiners of Accounts where the same is of **Doubtful Collectibility**.

"My contention is that where an official has a bond and the charge against the official is legal the Court of County Commissioners has no jurisdiction in the matter and therefore cannot relieve the official of paying said charge. If the official has a bond sufficient to cover the amount legally charged there is no doubt that the amount due can be collected.

"Please advise me as to your interpretation of the words 'Doubtful Collectibility'.

Generally, the authority and jurisdiction of the county governing body are limited to such as are expressly or impliedly granted to it by the Legislature.

As pointed out in the former opinion of this office referred to in your letter of inquiry (Quarterly Report of the Attorney General, Volume 1, page 342) the original authority to that end was granted by sub-section 11 of Section 6755 of the Code of 1923. That sub-section was amended by Acts 1933, page 201, as follows:

"That sub-section 11 of section 6755 of the Code of Alabama of 1923 be amended to read as follows: 11. To compromise on such terms as they may deem just, all doubtful claims in favor of counties when such claims arise on account of moneys, heretofore paid in good faith, by order of such courts, or in any case where they deem it to the best interest of the county."

One effect of the 1933 amendment was the addition of the clause: "or in any case where they deem it to the best interest of the county." Prior to the amendment, the Supreme Court construed the sub-section in *Mobile County v. Williams*, 180 Ala. 639, 61 So. 963. There the court said:

"The court of county commissioners have no right to compromise, under the authority conferred by the above section, any claim in favor of the county, except such claims as were in existence when on August 26, 1909, the Code of 1907 was adopted, and then only such claims as are doubtful and which were paid in good faith, by order of the court of county commissioners. The words 'doubtful' and 'good faith' used in the above subdivision, are jurisdictional and, unless the claim is of doubtful validity and the money was paid in good faith by order of the court, then the members of the court of county commissioners, acting in said matter, are without authority to act and if under such circumstances they do act and compromise such a claim then such compromise is void and not binding on the county."

The added clause "or in any case where they deem it to the best interest of the county" has the effect of broadening and extending the preceding clause of the statute "when such claims arise on account of moneys, heretofore paid in good faith, by order of such courts". Prior to the amendment the claim must have been such as was in existence at the time of the adoption of the Code of 1907 and arose on account of moneys theretofore paid in good

faith by order of such county governing body. Since the amendment, the authority to compromise has been extended to include all claims of doubtful validity, whether or not they arise on account of money paid in good faith by order of the court. But it is essential under the 1933 amendment, as it was under the original subsection, that the claim to be compromised be "of doubtful validity". **Mobile County v. Williams**, supra.

In this connection, the following excerpt from the opinions in Williams case, supra, is peculiarly apt:

"To place the construction upon it contended for by appellee would be, to use almost the very words of a distinguished judge who was discussing a question somewhat similar to the one now under consideration, to pave the way by which it would be easy for a public officer, under the guise of a legal claimant against a county, through the aid of its commissioners, if the latter were inclined to close their eyes to legal prohibitions, to unlawfully obtain and appropriate to its own use the public money, and, when called upon in a court of justice to account for the same, deny the right of the county's recovery upon the ground that he had made a compromise with the commissioners who had, by their own illegal act, enabled him to obtain the money. We cannot believe that it was the purpose of the Legislature to thus allow public officials to thus condone their own illegal acts; and this statute must be construed according to the legislative purpose."

It is, therefore, my opinion that if the examining agency charges a public officer with money on account of malfeasance, misfeasance or non-feasance in the performance of the duties of his office whereby public moneys are lost to the county, and the facts upon which the charge is based leave no reasonable basis for an honest doubt, by an advised mind, as to the validity (that is to say, the legal sufficiency) of the charge, then, in such event, the county governing body is without authority or jurisdiction to compromise the claim.

The fact (if such be the fact) that, because of the financial condition of the officer or his surety, the full amount of such claim cannot be realized by suit or otherwise, is not sufficient to confer jurisdiction upon the county governing body to enter into a compromise.

It is not to be understood from this opinion that the charge as reflected in a report of examiners of account is absolutely conclusive upon the right of the county governing body to compromise a claim based thereon. Investigation into the facts upon which the charge is based may be made; and if the facts do not support the charge of the examiner of accounts, or if that official incorrectly applies the law to the facts, then the county governing body may compromise the claim if it is of "doubtful validity". On the other hand the county is not concluded by the decision of the county governing body that any claim is of "doubtful validity". The final decision as to the validity of the claim based upon a charge made by the examiner of accounts, as well as to the efficacy of a compromise of the same by the county governing body rests with the Attorney General in cases not litigated or with the courts. And upon a review of the charge of the examining agency or of the compromise of the county governing body, the facts will be ascertained and the law applied thereto in determining the propriety of the charge or validity of the compromise.

To the extent that the former opinion of this office (Quarterly Report of Attorney General, Volume 1, page 342) may conflict with the conclusions herein reached, the same is withdrawn and overruled.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 6, 1936.

Hon. L. C. Garrison,
Judge of Probate,
Walker County,
Jasper, Alabama.

Person who maintains definite location in various towns in which he shows motion pictures with equipment moving from place to place is not subject to transient license but must pay regular license in each community in which place is located.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of September 11, 1936, in which you request my opinion as follows:

"The license inspector of Walker County has requested me to secure a ruling from you on the following:

"There are several people in Walker County operating what might be called transient moving picture shows. Each of these parties operate in four or five towns. They rent a house in each town in which they show their pictures and pay the regular state license as provided by Section 96 of the License Schedule. However, each of them uses only one moving picture machine and that moving picture machine is moved from town to town. Each of these parties will rent a motion picture film for, say four or five days. They will then take that film and their moving picture machinery and move from one town to another where they have buildings rented and show the picture in those buildings in each of the four or five towns.

"Section 95 of the License Schedule provides for a license tax of \$50.00 for the first week and \$25.00 for each additional week thereafter for every person operating a transient moving picture show in each place where it is operated. I would like to be advised if the parties showing in several towns under the conditions outlined above are classed as operators of transient moving picture shows and whether or not they are required to pay the license tax as provided for by Section 95 of the License Schedule."

I am of the opinion that persons who operate moving picture shows in the manner detailed by you are not liable for transient license. They should be taxed under Section 348, Schedule 96 instead of under Schedule 95. The transient license in Schedule 95 was designed for those who go from place to place exhibiting a picture or group of pictures in "road show" fashion. Moving part of the equipment from place to place would not make the performance "transient", and I do not think the legislature intended for such operations to be taxed under Schedule 95.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 9, 1936.

Hon. J. H. Green,
Clerk of Circuit Court,
Decatur, Alabama.

For any violation of any provision of what is known as the Uniform Firearms Act, the solicitor's fee is \$10.00.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 6, 1936, in which you request my opinion as follows:

"Will you please give me your official opinion as to what the proper Solicitor's fee to be charged upon a conviction for violating the 'Uniform Firearms Act', passed by the Legislature of Alabama at the extra session of 1936, page 51. Please let me have this opinion at your earliest convenience, as I am in need of same."

In answer to your request, I call your attention to Section 17 of the Act you refer to (General Acts 1936, page 51 extra session). Section 17, supra, has to do with the penalties for violation of any provision of the Act and is as follows:

"PENALTIES: Any violation of any provision of this Act constitutes an offense punishable by a fine of not more than \$500.00 (five hundred dollars) or imprisonment for not more than one year, or both."

You will note from the above that the offense included in the act is a misdemeanor for the reason the punishment is fixed by fine and imprisonment for not more than one year but I do not find where the act itself

provides for solicitor's fee on conviction for any of the offenses included in the act so we are compelled to look to the general law under Section 3788, Code of Alabama of 1923, which section was to do with solicitor's fees. Here we find the following provision:

"For each conviction of a misdemeanor not otherwise provided for, \$10.00."

From the above we are of the opinion that the solicitor's fee for the conviction of any provision of the act, supra, is \$10.00. Biennial Report of Attorney General, 1930-32, pages 399 and 43.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 20, 1936.

Hon. J. M. Lyon,
Chairman, Board of Revenue,
Shelby County,
Columbiana, Alabama.

County Financial Control Act—

Funds borrowed in accordance with Section 11, may be used for purchase of building, after allowance for all current expenses.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of October 31, 1936, in which you request my opinion as follows:

"Due to the expansion of duties devolving upon the county to meet the needs provided by law, this county has had to lease offices out in town away from the court house for the Health Department, the County Farm Agent, Department of Public Welfare, the County Home Demonstration Department, the Circuit Judge's office and that of the official court reporter. The Board of Revenue now has an opportunity to purchase a building which will house all the departments enumerated above, together with the Department of Education.

"The Board of Revenue of Shelby County has complied with the requirements of 'The County Financial Control Act', and has also had set aside an Emergency Fund as now required by law.

"This county is now indebted in a small amount beyond the constitutional debt limit. However, with the revenue in hand and the

revenues derived from a loan made in anticipation of the collection of the tax revenues for the current fiscal year, the county has on hand, after setting aside the fund heretofore named, and also the Emergency Fund, a sufficient sum on hand to purchase or construct an office building of sufficient dimensions to house the several departments heretofore named. The questions that I desire your opinion on are as follows:

"First. Is the Board of Revenue authorized to take the surplus funds now on hand, derived in the manner heretofore stated, and construct or purchase a county building for housing the several county departments heretofore named.

"Second.—Would the Board of Revenue be authorized, notwithstanding the fact the county is beyond the constitutional debt limit, to borrow money in anticipation of tax revenues for the current fiscal year, and use the same for the purchase or construction of said county building, provided they had complied with The County Financial Control Act and the Emergency Fund Act heretofore referred to."

If by "surplus funds" you refer to sinking funds, I am of the opinion that such funds could not be used for the purchase of a building.

The Board would be authorized to borrow in anticipation of tax revenues for the current fiscal year in accordance with the provisions of Section 11 of the County Financial Control Act (1935 Acts page 803), and if funds are sufficient after allowance for all **current expenses**, to permit the purchase or construction of a building, such purchase might properly be made.

I do not believe that this is such an emergency as is contemplated in Section 17 of the County Financial Control Act. (See opinion addressed to Hon. Frank Underwood, Russellville, 3rd Quarterly Report, page 208).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 25, 1936.

Hon. J. Foy Laseter,
Judge of Probate,
Barbour County,
Eufaula, Albaama.

Counties—Board of Revenue may pay for toilet paper and paper towels used by offices in courthouse.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have letter of Messrs. McDowell & McDowell of November 5, 1936, requesting opinion on your behalf as follows:

"Is an account against the County of Barbour for \$6.00 for one case of toilet paper an account that the Board of Revenue can pay?

In this connection, we also beg to request an opinion as to whether or not an account for tissue paper towels used by all the officers in the Court House, can be approved and paid for by the Board of Revenue."

Answering your first question, I advise you that the Barbour County Board of Revenue may properly pay for the case of toilet paper, provided of course, that such paper is furnished for the various offices of the County.

It is further my opinion that the Board of Revenue may properly approve an account for tissue paper towels used by the officers in the courthouse.

This office has heretofore held, in an opinion to Mrs. Mary M. Crook, Clerk, Board of Revenue, Evergreen, Conecuh County, Alabama, under date of April 12, 1935, that the Court of County Commissioners was authorized, under sub-section 2 of Section 6755, Code of Alabama of 1923, to furnish individual drinking cups for the various offices of the County. Sub-section 2 is as follows:

"It shall be the duty of the Court to provide a janitor for the courthouse and to see that the janitor keeps clean and in a sanitary condition all the court rooms, corridors, halls and offices in the courthouse of their respective counties."

I am of the opinion that the reasoning used in the opinion referred to above is equally applicable here. It was there said that the words "keeping clean and sanitary" authorized the furnishing of the drinking cups. It is my opinion that the same words would authorize the supplying of both the toilet paper and paper towels to the various county offices.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 3, 1936.

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

Attention Hon. Harry Simon, Chief Clerk, License Department.

Licenses—Schedule 74 of 1935 Revenue Act, Act No. 194, General Acts, 1935, page 256, approved July 10, 1935, construed—

1. A person keeping a public inn or lodging house is engaged in the business of keeping a hotel, within the meaning of Schedule 74,

supra, if he has in such public inn or lodging house as many as five bedrooms "where transient guests are lodged for pay."

2. A person engaged in the business of keeping a hotel must pay a license according to the graduated scale contained in Schedule 74, supra, based on the total number of rooms in the hotel "where transient guests are lodged for pay."

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 6, 1936, which follows:

"Your interpretation of Schedule 74, Section 348, Revenue Acts of 1935, is requested under the following statement of facts:

"A public inn, which is classified as a hotel by reason of the fact that five or more rooms are occupied by transients, "transients" being defined as persons who are lodged for pay for less than one week at such hotel; said hotel has a total of twenty rooms but contends that only five rooms are occupied by transients, the remainder being occupied by guests who rent rooms for more than a week, and in many cases rent on a monthly basis.

"Would such hotel be required to pay a license based on five rooms or would it be required to pay a license based on twenty rooms?

"As stated above, a lodging house or inn must have at least five rooms for transients before it would come under the provisions of Schedule 74. The license on this Schedule is levied on the number of rooms in the hotel regardless of whether or not they are occupied by transients as defined in said Schedule, or whether they are occupied by persons who stay longer than a week. "Transient guests" modifies "house" and not "rooms".

"While you have made former ruling in construing this Schedule, an exemption of all rooms not occupied by transient guests would open the way for unlimited evasions of this Schedule, as well as much controversy. Would you not construe the language of this Schedule as implication of the intention of the legislature to base the license upon the number of rooms open to guests for pay, regardless of the duration of their stay?

"In defining a hotel, did not the legislature by implication, though not clearly stated, intend first to define what constitutes a hotel, and after such business qualifies as a hotel by the occupancy of at least five rooms by transient guests, become subject to the payment of a license based on the total number of rooms in said hotel?

"My request for an opinion is rather argumentative, which is accounted for by my intense anxiety over the proper interpretation by you of this law, for which I most humbly ask your indulgence."

In answer to your letter I shall construe Schedule 74 of the 1935 Revenue Act, Act No. 194, General Acts 1935, page 256, approved July 10, 1935, which is the schedule levying a license on hotels.

Schedule 74, *supra*, reads as follows:

"Schedule 74. Each person keeping a public inn or lodging house of five or more bed rooms where transient guests are lodged for pay shall be deemed for the purposes of this Act to be engaged in the business of keeping a hotel. A transient guest is one who puts up for less than one week at such hotel, but such a house is no less a hotel because some of the guests put up for longer periods than one week. Every person keeping a hotel as defined in this section shall pay an annual license tax as follows: Hotels with five rooms and not over fifteen rooms, fifty cents for each room; hotels with over fifteen and less than fifty rooms one dollar (\$1.00) for each room; hotels with fifty rooms and less than one hundred rooms, one dollar and fifty cents (\$1.50) for each room; hotels with one hundred rooms and over, two dollars (\$2.00) for each room. If meals, food or refreshments are served to the general public and charged for, then the additional license required to be paid by restaurants, cafes, lunch counters and public eating houses shall be paid. Provided that where cottages or annex are operated in connection with, or rented by, such hotel the above schedule shall apply to the total of the rooms in the hotel and the cottages and annex."

The first question that presents itself is when does a public inn or lodging house become a hotel within the meaning of the schedule. The schedule plainly says that a public inn or lodging house becomes a hotel when it contains "five or more bed rooms where transient guests are lodged for pay." This much of the schedule is clear. It is my opinion, that a public inn or lodging house becomes a hotel, within the meaning of Schedule 74, *supra*, when it contains as many as five rooms in which "transient guests are lodged for pay."

The schedule defines a "transient guest" as "one who puts up for less than one week at such hotel". Therefore, we do not need to discuss what is meant by the term "transient guests" as used therein.

Each person keeping a hotel as defined in the schedule is liable for a license based upon a graduated scale, according to the number as set out in the schedule.

The next question that confronts us is whether the term "rooms" as used in the graduated scale of the schedule means only the number of rooms in which "transient guests are lodged for pay" or whether it means the total number of rooms in the hotel. Throughout the graduated scale the term "rooms" is used without the modifying clause "where transient guests are lodged for pay". Had the Legislature intended for the term "rooms" as used in the graduated scale to mean only "rooms" "where transient guests are lodged for pay" it is my opinion that it would have so stated by using the modifying clause, just as it did when it used the term in defining a hotel in the first part of the schedule. Having failed to use this modifying clause in the graduated scale, it is my opinion that the Legislature did not mean for the scale to be based only on the number of rooms "where transient guests are lodged for pay" but that it intended for it to be based on the total number of rooms in the hotel. This conclusion is strengthened by the last sentence of the schedule which reads:

"Provided that where cottages or annex are operated in connection with, or rented by, such hotel the above schedule shall apply to the total of the rooms in the hotel and the cottages and annex."

You will note that this sentence plainly deals with the **total** number of rooms and that nothing therein can be construed to mean **only** rooms "where transient guests are lodged for pay".

Therefore, it is my opinion, that when a person becomes engaged in the business of keeping a hotel by virtue of the fact that his public inn or lodging house contains as many as "five bed rooms where transient guests are lodged for pay" then he must pay a license on such hotel according to the graduated scale contained in Schedule 74, supra, based on the total number of rooms in the hotel and not based only on the number of rooms therein "where transient guests are lodged for pay".

The following opinions have been rendered by this office dealing with this general subject.

State Tax Commission, July 31, 1920, found in Report of Attorney General, 1918-20, at page 605;

State Tax Commission, September 5, 1930, office edition, Book 19 page 86;

Judge of Probate, Dallas County, September 10, 1930, office edition, Book 19, page 129;

Hon. R. E. Williams, Judge of Probate, Marshall County, September 4, 1935, office edition, Book 16, page 95;

Hon. Saxon P. Joyner, Judge of Probate, Houston County, October 17, 1935, Quarterly Report, Attorney General, October-December, 1935, page 86.

Any and all statements contained in these opinions which conflict with the views expressed in this opinion are hereby modified to conform with the views expressed herein.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 3, 1936.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

License—Person practicing profession of oculist, optometrist or optician must pay appropriate license levied by Schedule 100 of the

1935 Revenue Act in each city, town or other place in which he regularly engages in the practice of his profession.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 22, 1936, in which you make the following inquiries:

"When an optometrist has taken out a license under Schedule 100 of the 1935 Revenue Act does this license permit him to go from town to town and practice his profession or does he have to take out additional State license in each town in which he practices his profession?"

It is my opinion that a person practicing the profession of an oculist, optometrist, or optician must take out the appropriate license levied by Schedule 100 of the 1935 Revenue Act in each city, town or other place in which he regularly engages in the practice of his profession.

Schedule 100 of the 1935 Revenue Act reads:

"Each oculist, optometrist or optician practicing his profession: in cities or towns of over five thousand (5000) inhabitants shall pay an annual license of twenty-five dollars (\$25.00); in cities or towns of less than five thousand (5000) and more than one thousand (1000) inhabitants, ten dollars (\$10.00); in all other places whether incorporated or not five dollars (\$5.00); but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged each oculist, optometrist or optician so engaged shall pay the license as above stated, provided that the license imposed by this Section shall not apply until such oculist, optometrist or optician shall have practiced his profession as long as two years."

and sub-section (a) of Section 350 of said Act reads:

"(a) Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business except as specifically otherwise provided."

(Of course, Schedule 100 provides that no county license shall be levied.)

In my opinion the above quoted provisions of the 1935 Revenue Act are very clear to the effect that a person practicing the profession of an oculist, optometrist or optician must pay the appropriate license levied by Schedule 100, supra, in each city, town or other place in which he regularly engages in the practice of his profession. The payment of the appropriate license levied by Schedule 100 in one place would not exempt such person from the payment of the appropriate license levied by this schedule for any other place or places in which he regularly engages in the practice of his profession. The amount of the license required in each place would be the amount set in the schedule for a place of that particular classification.

Of course, if such person only made an occasional trip into cities, towns, or other places other than the place where he had procured a license under Schedule 100, supra, and did not **regularly** engage in the practice of his profession in such cities, towns or other places he would not be liable for an additional license in such places.

The reasoning here used in arriving at this conclusion is in accord with the reasoning used in an opinion of this office to the State Tax Commission under date of August 18, 1931, found in Biennial Report, Attorney General, 1930-1932 at page 413, dealing with analogous situation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 5, 1936.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Birmingham, Alabama.

Practice of Law.—

1. A person not a regularly licensed attorney cannot become entitled as a matter of right to engage in the business of enforcing, settling, adjusting or compromising claims based on contracts or policies of insurance between persons with neither of whom he is in privity in the relation of employer and employee in the usual sense by virtue merely of taking out and paying for a license under General Acts, 1935, page 442, Schedule 5.

2. Such statute, insofar as it might purport to grant any such right to other than a regularly licensed attorney at law would be unconstitutional as invasive of the powers of the Judicial Department.

3. A person who is not a regularly licensed attorney who engages in such action is subject to the penalties provided in General Acts, 1931, p. 606 and other appropriate preventive action by the Courts.

4. Such action in fact constituting the practice of law, a corporation, firm or other artificial creation cannot lawfully engage therein in any event.

Opinion by Attorney General Carmichael.

Dear Sir:

I wish to acknowledge receipt of your letter of June 2, 1936, which is as follows:

"There are several insurance adjusters doing business in this County. They are not regularly salaried employees of an insurance company but operate a business as an individual calling and are confined to the adjustment and settlement of insurance claims.

"Will you kindly advise me what license fee, if any, such adjusters and their employees would be liable for. The adjusters referred to have not been licensed or admitted to practice law.

"I invite your attention to Article 13, Chapter 1, Schedule 5, of the Revenue Bill of 1935. There, a license tax of \$25.00 is imposed upon 'each adjuster of fire, automobile, property damage, collision, liability or other losses'.

"I also invite your attention to the General Acts of 1931, page 606, which defines the practice of law and prescribes penalties for the unauthorized practice of law and for those who conspire with or aid and abet another person in the unauthorized practice of law.

"If a license tax of \$25.00 or any other license fee is collectible from such individual adjuster, a non-lawyer, would this give him the right to adjust and settle claims as referred to in the General Acts of 1931, page 606, Section 2, Subsection D?

"What rights, if any, would the collection of the proper license fee from an individual adjuster, not licensed to practice law, confer upon such person? And would the collection of such license fee relieve him or the companies who might aid or abet him, from the penalties prescribed by the Acts of 1931, page 606?"

I assume that by reference to the practice of "adjustment and settlement of insurance claims" you mean the offering of one's services for hire generally, either to insurance carriers or to the public for the purpose of defeating, adjusting, settling, compromising or collecting all or parts of claims based upon some contract or policy of insurance.

The essential questions raised by your inquiries are, first, whether such action constitutes the practice of law within the definitions laid down by the courts and the legislature, and second, if so, whether one who is not a regularly licensed attorney may become entitled to perform such acts upon payment of \$25.00 and procurement of the license provided by Acts 1935, page 442, Schedule 5.

The action to which you refer, as amplified above, undoubtedly comes within the legislative definition of what constitutes practicing law as set out in Section 2 (d) of Acts 1931 p. 606, which is as follows:

"Section 2. For the purposes of this act, the practice of law is defined as follows: Whoever * * * (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law."

The Act further provides penalties as follows:

"Section 3. Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this act to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law. And any person, firm or corporation who conspires with or aids and abets another person, firm or corporation in the commission of such misdemeanor must, on conviction, be punished as provided by law."

Our Supreme Court in *Berk v. State*, 142 So. 832, considered this particular provision of the 1931 Act, and held that the acts of the defendant in soliciting for collection a promissory note and in collecting the amount thereof from the unwilling maker for compensation constituted practicing law within the statutory definition and prohibition. After a comprehensive review of other pertinent decisions, the court upheld the entire validity of the Act in the following broad language:

"It is well settled that the act in question (Gen'l Acts 1931, p. 606) is a valid enactment under the police power, and offends neither the State nor Federal Constitutions; it is not usurpation of judicial power; does not deprive of liberty or property without due process; neither denies to citizens equal civil rights, nor grants special privileges and immunities; does not violate, impair or deny rights retained by the people and does not violate the Fourteenth Amendment to the Federal Constitution; as applied to the facts of this case."

So then, one who, as a vocation, enforces, secures, settles, adjusts or compromises claims based upon contracts or policies of insurance, between persons, with neither of whom he is in privity in the relation of employer and employee, in the usual sense, is engaged in the practice of law, and unless properly qualified and licensed so to do is subject to the pains and penalties set out in Acts 1931, page 606. It matters not that he is attempting to defeat or reduce such a claim, rather than to enforce or collect it. The acts are correlative and equally covered by the statute. Furthermore, such action in fact constitutes the practice of law, even apart from the statutory definition, under the rules of decision laid down by the courts. See the *Berk Case*, supra, and the decisions there cited and quoted; also *Boykin v. Hopkins*, 162 S. E. 796 (Ga.)

Next we pass to the question whether one who is not a regularly licensed attorney may become entitled to practice law in the manner inquired about merely by virtue of taking out and paying for a license under Schedule 5, Acts 1935, page 442, provides as follows:

"Schedule 5. Each adjuster of fire, automobile, property damage, collision liability or other losses, Twenty-Five Dollars (\$25.00) to the State, but no license shall be paid to the County. If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license provided herein. The license paid in one county shall not be required to be paid in any other county in the State. Provided that this license tax shall not apply to any local insurance agent who adjusts losses for the insurance company which he regularly represents."

This question involves principles fundamental in our constitutional jurisprudence and merits detailed consideration.

Under our form of constitutional democracy the essential powers of government are carefully divided into three branches, each of which is substantially independent of the others, exercising paramount authority within its primary sphere. Section 42 of our Constitution (1901) provides:

"Section 42. The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 139 of our Constitution provides:

"Section 139. The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or in equity, or both shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars."

The administration of justice is at once the duty and the power of the Judicial Department. The courts established under the mandate of the Constitution are the immediate and effective arms of the department in the administration of justice. Essential to the existence, the dignity and the proper performance of the functions of the courts thus created is the inherent authority over the conduct of the members of the bar. In re Burton, 246 Pac. 188. In re Ole Mosness 39 Wis. 509, 20 Am. Rep. 55; Re Applicants for License to Practice Law, 55 S. E. 636, 10 L. R. A. n. s. 288, Ex parte Steckler, 179 La. 410, State v. Hacher, 129 No. 271, 31 S. W. 889, In re Morse, 126 Atl. 550; People v. Merchants Protective Corp. 209 Pac. 363; State v. Credit Mens Assn., 43 S. W. (2d) 918; 2 Ruling Case Law 946. They are officers of the court and amenable to its authority, both as to admission to the right to practice law and the exclusion therefrom. Ex parte Thompson 228 Ala. 113, 152 So. 229, In re Opinion of the Justices, 180 N. E. 725 (Mass.), 81 A. L. R. 1059; Ex parte Wall., 107 U. S. 265, 27 L. ed 552.

By virtue of this inherent power the courts exercise the right to declare what constitutes the practice of law, although the legislature may or may not have attempted to define it. People v. Merchants Protective Corp., 209 Pac. 363 (Cal.); Boykin v. Hopkins 162 S. E. 796 (Ga.); Re Eastern Idaho Loan etc. Co., 288 Pac. 157, 73 A. L. R. 1323; People v. Peoples Bank, 176 N. E. 901 (Ill.) People v. Assn. of Real Estate Taxpayers, 187 N. E. 823; Eley v. Miller, 34 N. E. 836 (Ind.); in re opinion of the Justices, 194 N. E. 313 (Mass.) People v. Title Guarantee Co., 125 N. E. 666 (N. Y.); Land Title Co. v. Dworken, 193 N. E. 650 (Ohio).

Speaking of the practice of law and the qualifications imposed thereon, the Supreme Court of Massachusetts, in Opinion of the Justices, 194 N. E. 313, used the following apt language:

"It is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. After one has been sanctioned in these respects, the oath as an attorney must be taken, whereby one becomes an officer of the court and subject to its discipline for violation of his obligations even to the extent of removal from his office. A dual trust is imposed on attorneys at law; they must act with all good fidelity both to the court and to their clients. They are bound by canons of ethics which have been the growth of long experience and which are enforced by the courts. * * * The relation of an attorney to his client is pre-eminently confidential. In addition to adequate learning, it demands on the part of the attorney individual allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interest of his clients. Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites."

This is not to say that the legislature is denied any right whatever to deal with the practice of law, for while the legislature may not interfere with or usurp the inherent judicial power, it may exercise its police power in aid of the courts. The practice of law, being affected with a public interest, the legislature may fix **minimum** requirements and forbid the admission of persons not possessing those requirements to practice, but it cannot determine the ultimate **maximum** qualifications and require the acceptance by the judiciary of those possessing them. In re Bailey, 248 Pac. 29; Brodenjack v. State Bar, 281 Pac. 1018, 66 A. L. R. 1507; Ex parte Garland, 4 Wall. 333; In re Cannon, 240 N. W. 441. See Berk v. State, 142 So. 832, cited above; People ex. rel. Chicago Bar Assn. v. Motorist Assn., 188 N. E. 827 (Ill.).

The matter is succinctly stated by the Supreme Judicial Court of Massachusetts in the opinion of the Justices, 194 N. E. 313, as follows:

"Valid permission to practice law cannot be given by the General Court (Legislature except subject to the requirements for admission to the bar established by the Judicial Department. * * * **Legislation forbidding** such practice of the law by corporations or associations or by individuals others than members of the bar, would be **within the competency** of the General Court. * * *

"It would not be within the competency of the General Court to enact legislation designed to permit such practice of law by corporations or associations or by individuals other than members of the Bar of the Commonwealth."

Adverting to the specific circumstances referred to, the action of such independent insurance adjusters, in compromising, adjusting and settling claims based upon insurance policies and contracts between persons with neither of whom he is in privity as employer and employee in the usual sense does in fact constitute the practice of law. It has been so held. Townsend v. State Bar of California, 291 Pac. 839; Shaw v. State Bar of California, 297 Pac. 532, Hightower v. Detroit Edison Co., 247 N. W. 97 (Mich.); Fitchett v. Taylor, 254 N. W. 910 (Minn.), 95 A. L. R. 356. Our own court in Berk v. State, 225 Ala. 324, recognized that the collection of accounts for hire, without institution of suit, was practicing law and that the legislature

might exercise its police power in aid of the courts in preventing such practice by one not a licensed attorney.

It is too well settled to admit of argument that the practice of law comprehends much more than the appearance in court in litigated cases. Our own court in the Berk case, 225 Ala. 324, 142 So. 832, said,

"It is unnecessary to observe, a fact of common knowledge, that it has been the usual business of a lawyer, for the past one hundred years in this state, as shown by the decisions we have cited, to engage in office practice not necessitating representation in court, as well as in cases needed in and about the collection and settlement of claims and demands."

To like effect is *Boykin v. Hopkins*, 162 S. E. 796 (Ga.).

The courts owe the duty, not only to actual litigants, but also to the people at large, each of whom is a potential litigant, to protect them not only from corrupt or unscrupulous attorneys but also from the activities of unauthorized and unqualified law practitioners.

While our Supreme Court has not specifically enunciated all of the principles here set out, it has done so in part and has recognized the essential philosophy of government underlying them. *Berk v. State*, supra, *Ex parte Thompson*, 228, Ala. 113, 152 So. 229; *In re Fite*, 228 Ala. 5, 154 So. 119.

In view of the foregoing I am persuaded and hold: First, that a person, not a regularly licensed attorney, cannot become entitled as a matter of right to engage in the business of enforcing, settling, adjusting or compromising claims based upon contracts or policies of insurance between persons with neither of whom he is in privity in the relation of employer and employee in the usual sense by virtue merely of taking out and paying for a license under Schedule 5 of General Acts 1935, p. 442; Second, that such statute, insofar as it might purport to grant any such right to other than a regularly licensed attorney at law would be unconstitutional as invasive of the powers of the Judicial Department; third, that a person who is not a regularly licensed attorney who engages in such action is subject to the penalties provided in General Acts 1931, page 606, and also appropriate preventive action of the courts; fourth, that, such action in fact constituting the practice of law, a corporation, firm or other artificial creation cannot lawfully engage therein in any event.

I trust that this answers your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 7, 1936.

Hon. B. L. Balch,
Superintendent of Education,
Fayette County,
Fayette, Alabama.

Statutes—

1. Act No. 94 (General Acts 1936, page 58) held not to repeal Section 9 of Act No. 300 (General Acts 1935, page 730) providing for the borrowing against the revenues of the current year.

2. Board of Education of Fayette County authorized to borrow money for paying teachers' salaries, etc. and to pledge current funds under Section 9 of Act No. 300 (General Acts 1935, page 730).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of November 10, 1936, in which you request my opinion as follows:

"The Board of Education of Fayette County desires to borrow \$20,-000.00 for the purpose of paying teachers' salaries and other current expenses. The First National Bank of Fayette is willing to loan us this money if we can legally pledge the current funds due or to become due the Board of Education for the fiscal year 1936-1937, the loan to be repayable January 15, 1937 and March 1, 1937 and to bear six per cent interest per annum from date of issuance.

"The attorney for the bank has expressed some doubt about the validity of such loan in view of Acts of the Legislature, approved April 6, 1936 and found on pages 58 and 69 of said Acts. This attorney's doubts and uncertainties are mainly based on Section 25 of said Act which is the repealing clause and also on Section 18 thereof. One question raised is the general provisions in Section 25 repealing all laws inconsistent with the provisions of this (1936) Act; following which is excepting from the provisions thereof Sections 10 to 14 of 1935 Acts, page 728, until October 1, 1936.

"It is under the provisions of Act No. 300, Section 9, page 730 of Acts 1935, approved September 2, 1935, that we desire to obtain and secure this loan.

"Will you please advise if, in your opinion, this can be legally done so that the Bank which makes the loan will be duly protected?"

In my opinion, the Board of Education of Fayette County may lawfully borrow the desired funds under Section 9 of Act No. 300 (General Acts 1935, page 728) and pledge the current revenues of the fiscal year therefor as provided by said section.

Act No. 94 (General Acts 1936, page 58) to which you have directed attention, purports to repeal "all laws and parts of laws, general or local, inconsistent with the provisions" of said Act. Sections 18 and 25 of Act 94 provide as follows:

"Section 18. **EXCLUSIVENESS OF THIS ARTICLE.**—No warrants payable in any fiscal year later than the fiscal year in which they were issued shall be issued on or after October 1, 1936, except in accordance with the provisions of this Act. Warrants may, however, be issued by any county or city board of education at any time prior to October 1, 1936, in accordance with the provisions of No. 300 of the Acts of 1935, approved September 2, 1935, and Sections 281 and 286, inclusive, of the Alabama School Code of 1927, as amended by No. 507 of the Acts of 1935, approved September 13, 1935, without regard to any provisions of this Act."

"Section 25. **REPEAL.**—No. 302 of the Acts of 1935, page 735, approved September 2, 1935, and Section 136 of the Alabama School Code and all laws and parts of laws, general or local, inconsistent with the provisions of this act are hereby repealed; provided, however, that Sections 10, 11, 12, 13, and 14 of No. 300 of the Acts of 1935, page 728, approved September 2, 1935, and Sections 281-286, inclusive, of the Alabama School Code as amended by No. 507 of the Acts of 1935, approved September 13, 1935, page 1090, shall remain in full force and effect until October 1, 1936, and until such date shall provide an alternative authority for the issuance of warrants by county and city boards of education."

The question, therefore, which necessarily confronts us is whether or not Section 9 of Act No. 300, supra, is in such conflict with Act No. 94 as to come within the repealing clause above cited. It is my opinion that Section 9 is not repealed by Act No. 94. Section 9 is as follows:

Section 9. **FUNDS MAY BE BORROWED AGAINST REVENUES OF CURRENT YEAR.**—Any county board of education or any city board of education shall have authority upon the recommendation of the county superintendent of education or city superintendent of education, as the case may be, to borrow money on the credit of the school fund of that county or city to meet the salaries of teachers and other current expenses when the current funds on hand are not sufficient to meet the same, and as security therefor, to pledge the current revenues of the current fiscal year. It shall be the duty of the county board of education and the county superintendent of education or city board of education and city superintendent of education to secure such a loan if practicable, when the current funds on hand are not sufficient promptly to pay teachers' salaries and other current expenses. All such current loans shall be due and payable not later than the end of that fiscal year. Provided, however, that the county board of education or the city board of education may issue certificates of indebtedness for payment of current expenses which are due when funds on hand are not sufficient to pay such obligations and when an adequate loan cannot be secured. Such certificates of indebtedness shall become due and payable, not later than the close of the fiscal year in which they are issued and shall pledge the current revenues of that fiscal year. At no time shall loans be secured or certificates of indebtedness be issued for current expenses during any year which shall pledge school revenues of any other fiscal year. The amount which is borrowed, either by loan or certificate of indebtedness, shall at no time exceed one-third of the sum paid for all current expenses, including teachers' salaries during the preceding school

year. Boards of education shall have authority to pay interest at the rate of not exceeding six per cent (6%) per annum on such loans or such certificates of indebtedness as may be issued."

It is a well known legal principle that in interpreting a law it is legitimate to take into consideration the history which led up to its enactment, the surrounding circumstances and the ends intended to be accomplished thereby. *Prowell v. State*, 142 Ala. 80, 39 So. 164. In this particular instance we note that Act No. 94 was passed with the express intention of so regulating school warrants, school finances etc. as to bring the provisions of Act No. 300, passed by the 1935 Legislature, within the rulings announced by the Supreme Court of Alabama in the Opinions of the Justices found in 164 So. 572 and 165 So. 100. The 1935 Act appears to have been really composed of two component parts, the first part establishing a budget system and providing for the preparation of budgets for each county and city school system, etc., while the second part, beginning with Section 10, provided for the issuance of certain warrants to be paid with the use of pledged tax fund. That the expressed intention of the Legislature was to amend or repeal Sections 10, 11, 12, 13 and 14 of Act No. 300 may be seen from the statement contained in Section 25 of Act No. 94 to the effect that these sections should remain in full force and effect until October 1, 1936, or until otherwise provided by the Legislature. This clearly shows that Act No. 94 was calculated to supplant these sections.

Some questions have arisen as to whether the doctrine "*inclusio unius est exclusio alterius*" should not be applied to Section 25 of Act No. 94, inasmuch as it is said that the Legislature has, by expressly mentioning Sections 10, 11, 12, 13 and 14 of Act No. 300 shown an intention to repeal all other parts of said Act. The maxim "*inclusio unius est exclusio alterius*" expresses a rule of construction and not of substantive law, and must be used only as an aid in discovering the legislative intent when it is not otherwise manifest. *City of Shreveport v. Price*, 77 So. 883 (La.). Thus we see that the only question remaining is whether Section 9 of Act No. 300 is actually in fact in conflict with the provisions of Act No. 94.

An examination of Section 9 readily reveals that it provides only for the borrowing of funds against the **revenues of the current year**. It authorizes loans to provide funds to meet the salaries of teachers and other current expenses when current funds on hand are insufficient therefor and it further provides that there may also be issued certificates of indebtedness for the payment of which current school revenues may be pledged. It does not authorize long time loans, nor does it authorize the pledging of tax funds levied over a designated period of years for school purposes. This then is the pivotal distinction, that Act No. 94 deals exclusively with the issuance of school warrants, etc., which are to be backed by the pledge of monies derived from taxes levied over a designated period of years, while Section 9 deals only with the borrowing of funds against the revenues of the current year. There is no conflict, in my opinion, between the two.

The premises considered, I, therefore, am of the opinion that Act No. 94 of General Acts of 1936 does not repeal Section 9 of Act No. 300 of the General Acts of 1935, and that consequently the Board of Education of Fayette County may lawfully pledge the current funds for a loan to be payable within the year, as provided by Section 9, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 14, 1936.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

As to the Probate Office, the phrase "Public record" as used in Section 14 of Act No. 240, S. 104, approved June 6, 1931 (General Acts 1931, p. 280) means any paper or court order which is recorded in that office.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state as follows:

"Please refer to Section 14, of the Veterans' Guardianship Act, Acts of the Legislature of 1931, page 280, and advise whether or not under said Section, it is the duty of this office to furnish certified copies of letters of administration and guardianship and other court orders, without charge to the applicant.

"The question in my mind is whether this Section includes court proceedings, or whether it refers to such records as birth certificates, registration certificates and marriage records."

In my opinion your question should be answered in the affirmative.

Section 14 of Act No. 240, S. 104, approved June 6, 1931 (General Acts of Alabama, 1931) provides as follows:

"Section 14. Whenever a copy of any public record is required by the Bureau to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting in his behalf or the representative of such Bureau with a certified copy of such record."

In regard to the probate office, it is my opinion that the phrase "public record", supra, means any paper or court order which is recorded in your office.

"A record is not a public one unless it can be inspected by any person interested. *Keefe v. Dowell*, 42 Atl. 345, 92 Me. 151."

Words and Phrases, First Series, Vol. 6. p. 5818.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 14, 1936.

Hon. Henry W. Naish,
Treasurer,
Shelby County,
Columbiana, Alabama.

Counties can legally pay for the use of sanitary sewerage system operated by a city.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of recent date which is as follows:

"The town of Columbiana installed a sanitary sewer system several years ago and assessed the property on it along same for payment of installation. At the time they assessed the jailhouse property and the Courthouse property of Shelby County to help take care of installation. A previous ruling of the Attorney General holds that it is not a legal assessment as you cannot sell county property for this assessment.

"At the present time the town of Columbiana is trying to collect a rental on this sewerage on the above mentioned county property. Please advise me if this rental is a legal claim and if I would be justified in paying same in case the Board of Revenue should issue a warrant for same."

I am of the opinion that your question should be answered in the affirmative.

The opinion of the Supreme Court in the case of City of Hartselle v. Madison County, 166 Ala. 389, is not, in my judgment, controlling of the question here presented.

There are numerous instances where municipalities have constructed and now operate their own waterworks systems, and where the county governments purchase water from the municipalities. I can see no difference from the situation in the instant case than that in the case of the county paying for water.

A municipality can, under the power to enact health regulating ordinances, require the county to provide for disposal of sewage.

The county could, of course, install its own sewage disposal system, but in the event they elect to use the facilities furnished by the municipality, I am of the opinion that they are liable for the rent in the same manner as any other user might be.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 15, 1936.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Elections—Justices of the Peace and Constables—Persons, otherwise qualified, elected to the offices of Justices of the Peace and Constables, in the General Election held in November, 1936 by their names being written in on the General Election ballot are duly and legally elected to said office or offices and the canvassing board should so certify them.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 6, 1936, as follows:

"I will thank you for your opinion on the following at your earliest convenience:

Several precincts in this County elected Justices of the Peace and Constables at Tuesday's election by writing their names on the General Election ballot. Is an election by this method legal and should the canvassing Board of Marshall County certify these parties as elected officials?"

I call your attention to Section 417 of the Code of Alabama 1923 which reads as follows:

"COUNTY OFFICERS; WHEN ELECTED.—One coroner, county commissioners or board of revenue of whatever number composed, or courts or boards of like jurisdiction, one tax assessor, one tax collector, one county treasurer in all counties having a county treasurer, two justices of the peace and one constable for each election precinct shall be elected on the first Tuesday after the first Monday in November, 1908, and every fourth year thereafter."

This provision of law clearly shows that the general election held on the first Tuesday after the first Monday in November, 1936 was the election at which Justices of the Peace and Constables should have been elected. Opinions of the Attorney General, Quarterly Report, Vol. 3, p. 143.

As to whether or not persons may be elected Justices of the Peace and Constables by their names being written in on the general election ballot, I quote as follows from an opinion of the Supreme Court in the case of *Garrett v. Cunningham*, 100 Sou. 845:

"It is provided that, if an elector desires to vote for each and every candidate for one party for whatever office to be nominated, he shall indicate the same by making a crossmark (X) 'in the circle under the name of the party at the head of the ticket.' Code Sec. 381. Provisions relative to voting for one candidate not on the party ticket are contained

in Section 382 of the Code, or for two or more candidates on different tickets. Code Sec. 384, or when straight ticket does not contain the names of all officers, Code Sec. 385, or to voting for a person whose name is not on the ballot, Code Sec. 386, which reads as follows:

'If the elector desires to vote for any person whose name does not appear upon the ballots, he can so vote by writing the name in the proper place on the blank column'."

The sections of the Code referred to in the above quotation are to certain sections of the Code of Alabama, 1907, namely: Sections 381, 382, 384, 385 and 386. These Code sections now appear in identical form in the Code of Alabama of 1923 as Sections 471, 472, 474, 475 and 476 respectively and are still the law of the State of Alabama on this subject at the present time.

Therefore, it is my opinion that persons, otherwise qualified, who are elected Justices of the Peace and Constables, at the General Election held in November, 1936 by their names being written in on the General Election ballot were duly and legally elected and that they should be certified by the Canvassing Board.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 21, 1936.

Hon. J. Percy Oliver,
Probate Judge,
Tallapoosa County,
Dadeville, Alabama.

Act No. 33, H. B. 119, approved February 8, 1935, not a limitation of powers theretofore possessed by a trustee, executor, administrator, guardian or one acting in other fiduciary capacity.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of some time back which is as follows:

"I am in receipt of a copy of an informal opinion rendered to Hon. Wm. W. Kelly, Veterans Administration, Tuscaloosa, Alabama, in regard to investment of funds of a ward by the guardian. The opinion appears to have been written by Mr. Thomas S. Lawson, a member of your staff. I would like to have an official opinion from your office on this matter. The only question involved is whether or not, under H. B. 119—Welch, Acts 1935, p. 65, is an investment by a guardian, trustee, executor or ad-

ministrator, or one acting in any other fiduciary capacity, of funds, where approved by the court having jurisdiction of the matter, unauthorized?

"Does this Act mean or even intimate that such an investment, where approved by the Court, would be unauthorized?

"Are such investments, where approved by the Court, limited to (a), (b), (c) and (d) as set forth in said Act?"

In my opinion the Act referred to in your letter (Act No. 33, H. B. 119, approved February 8, 1935) does not limit the powers theretofore possessed by a trustee, executor, administrator, guardian or one acting in other fiduciary capacity. It was intended to give these persons named additional authority. The powers therein conferred are in my judgment cumulative to those already possessed.

In my judgment, the Act above mentioned, was enacted principally for the purpose of extending the powers of trustees rather than guardians as under the provisions of Section 8149, Code of Alabama, 1923, guardians possessed such powers.

Subdivisions (a), (b), (c) and (d) of said Act, as I have said before, are not limitations but additional types of investments.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 29, 1936.

Hon. Henry J. Garrett,
Clerk, Circuit Court,
Hale County,
Greensboro, Alabama.

Preparation of record for appeal to Supreme Court covered by
Section 7278, Code of Alabama of 1923.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of October 22, 1936, which is as follows:

"Will you please advise me the legal charge allowed Clerks of the Circuit Court in preparation of transcripts to the Supreme Court.

"Section 6102 of the Code of 1923 sets out that the legal charge is ten cents a hundred words for the original and five cents a hundred for

copies thereof. Section 6108 of the Code of 1923 sets out that the charge for office copy shall be \$2.50. Section 7278 of the Code of 1923 sets out that record for Supreme Court for each one hundred words fifteen cents and each additional copy thereof for each hundred words five cents.

"We have at the present time a case which is ready for settlement and the question of legal charge has arisen and I will appreciate an early reply giving me your opinion."

The Court of Appeals in the case of **Middleton v. General Water Works & Electric Corp.**, 149 So. 352, has passed on the very question about which you inquire in your letter and held that Section 7278, *supra*, was controlling in view of the fact that it was the last enactment of the Legislature on the subject. The Supreme Court denied a petition for a writ of certiorari, thus concurring in the opinion rendered by the Court of Appeals.

That part of the opinion of the Court of Appeals pertinent to your inquiry is as follows:

"The sections above referred to pertain to the same subject and are in conflict. They were brought forward into the Code 1923. The statute passed and approved February 15, 1919, Gen. Acts of Ala. 1919, p. 84 (Section 2) was brought forward as section 6102. The latter statute, approved September 30, 1919, General Acts of Alabama 1919, p. 884, was brought forward in the 1923 Code as section 7278 thereof. There is no field of operation for both of these statutes because of the manifest and patent conflict. Where this is true, it becomes necessary to ascertain the legislative intent, and all particular rules for the construction of such provisions must be regarded as subservient to this end. The well-settled principle is that the last expression of the legislative will is the law in case of conflicting provisions of the statute on the same subject, and the last enacted in point of time prevails. We are, therefore, of the opinion that the item of cost controversy was properly taxed by the clerk under Section 7278 of the Code 1923, and that the court committed no error in this connection. It follows that the judgment appealed from must be confirmed."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 5, 1937.

Hon. Chas W. Lee,
State Comptroller,
Capitol.

Commissioners Courts—

1. Member of County Commission acting as Chairman Pro Tem and signing County warrants is subject to same personal liability for payment of illegal claim as if the regularly elected Chairman.

2. Office of Chairman not vacated by temporary illness, and payment of regular salary fixed by statute during absence by reason thereof, in absence of removal of office for incompetency, is not illegal expenditure of County funds.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of August 19th, which is as follows:

"The Court of County Commissioners of Madison County, Alabama, as created by Local Acts approved 2-3-23, page 3 and 9-20-30, page 216 (Local Acts 1923) and as amended by Local Acts 1927, 1931, and 1932, passed resolutions as follows:

"July 16th, 1934, Whereas, Mr. E. T. Terry, Chairman is expected to be absent from the City for two or three weeks, Therefore, be it resolved that J. Proctor Smith, be and he is hereby authorized to act as Chairman, Pro Tem, of the Board and to issue the County's warrants in payment of its bills, in the absence of Mr. Terry. February 4th, 1935, Whereas, Mr. E. T. Terry, Chairman, is away on leave of absence, therefore, be it resolved that J. Proctor Smith be and he is hereby authorized to act as Chairman Pro Tem of the Board and to issue the County's warrants in payment of its bills, in the absence of Mr. Terry and until further orders of the Board.'

"Under the first resolution Mr. Smith signed no county warrants in payment of claims against the County and under the second resolution all warrants in payment of claims were signed by Mr. Smith from Feb. 4th, 1935, to Dec. 16th, 1935 at which time Mr. Terry's successor was appointed and qualified, Mr. Terry having been absent from February 4th to date of his death on December 5, 1935. According to information obtainable Mr. Terry was away from his duties a considerable part of 1934 and performed none of his duties, as set out by Section 8 of Act creating said Board from February 4th, 1935, to date of his death.

"Taking into consideration the above will you please advise me as follows:

"1. In the event any warrant signed by Mr. Smith, as Chairman Pro Tem, was in payment of an illegal claim against the County, would such item be a charge against Mr. Smith and his bond?

"2. Did the act of the Board of February 4th, 1935, and Mr. Terry's failure to perform the duties as set out in Section 8 have the effect of an abandonment of the office of Chairman by Mr. Terry?

"3. In the event your answer to question 1 is in the negative, would any warrant signed by Mr. Smith in payment of an illegal claim against the County be a charge against Mr Terry and his bond?

"4. In the event your answer to question 1 is in the affirmative would any amount paid to Mr. Terry, after February 4th, 1935, as compensation for services be a legal expenditure of County Funds?"

In addition to the general reference of the facts in your letter, I understand that Mr. J. Proctor Smith was a member of the Court of County Commissioners of Madison County, his regular term embracing all of the time inquired about, and that while acting as Chairman Pro Tem he drew only his regular compensation as an associate commissioner.

Answering your first question, it is my opinion that Mr. Smith, having acted as Chairman Pro Tem of the Court of County Commissioners, and having executed warrants for the disbursement of County Funds, would be subject to the same personal liability for the disbursement of County funds in the payment of illegal claims against the County to the same extent as he would have been had he been the regularly elected Chairman.

Answering your second question, it is my opinion that the action of the Board on February 4th, 1935, designating Mr. Smith as Chairman Pro Tem during the absence of Mr. Terry and until further order of the Board, did not have the effect of vacating the office of Chairman, then held by Mr. Terry. It is to be observed that the Chairman of the Court of County Commissioners, under the Acts referred to, holds office for a term of four years at a fixed annual salary, payable monthly. The fact that during a part of his term Mr. Terry was absent by reason of illness would not of itself vacate his office as Chairman. Whether or not his illness and physical condition would constitute such an incompetency as would subject him to removal for cause under Section 4497 of the Code would in large measure depend upon the particular facts. In this connection I call your attention to the following quotation from the case of State Ex Rel Attorney General v. Martin, 180 Ala. 459, at page 467, wherein the Court, quoting from State Ex rel, etc. v. Lowe, decided at the same session, said:

"It is possible that incompetency of an official may exist by reason of either physical or mental conditions, and that it may bring detriment to the public whenever from any cause it may occur. But the law must be interpreted so as to allow it to operate reasonably, and such interpretation excludes from the term 'incompetency' all such mere temporary incapacity as ordinarily attends and is co-terminus with acute disease. The incompetency which serves for impeachment is such as characterizes the usual status of the officer and which will therefore be continuous in some degree."

The Court then laid down the further condition and limitation that the duration of the incompetency contemplated by law must be such as to indicate beyond a reasonable doubt that it will continue during the remainder of the term of the accused officer.

It therefore follows that Mr. Terry's office was not vacated in the absence of impeachment or removal proceedings prior to his death.

In reference to your third question, since your first question is answered in the affirmative, a further statement here would appear to be unnecessary.

In answer to your fourth question, since Mr. Terry's office has not been vacated during the time inquired about, payment of the regular monthly installments of his salary fixed by law was not an illegal expenditure of County Funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 5, 1937.

Hon. P. G. Lawley,
Tax Assessor,
Fayette County,
Fayette, Alabama.

Tax Assessor — Where book of assessments made by permanently binding original assessment lists, as authorized by Section 55 of 1935 Revenue Act, the Tax Assessor is not relieved from other duties required by law and specifically from making abstract required in Section 57 of said Act.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 9, 1936, in which, after quoting Section 57 and a portion of Section 55 of the 1935 Revenue Act, you ask:

"The question is, if we are relieved of making the 'book of assessment' and allowed to furnish the Tax Collector an abstract from the original assessment sheets, then are we required under Section 57, above set out, **when there has been no book of assessment made**, to make an itemized abstract for the State Comptroller and Tax Commission."

If you will read carefully Section 55, I think your difficulty will be obviated. I quote, in part, and emphasize:

"Provided that in counties where assessors are now allowed by law to use assessment lists in lieu of a book of assessments, the assessor shall not be required to prepare a book of assessments, as provided for in this section, but in lieu thereof, shall be required to arrange in alphabetical order original assessment lists, and cause the same to be permanently bound, **and such assessment lists when bound, shall constitute the book of assessments** as herein provided, and the certificate of the State Tax Commission, or the agent or assistant thereof provided for in the next section, shall be entered upon each of said bound volumes of assessments. Such assessment lists when bound shall be preserved permanently as a matter of record. In making the tax collectors' abstracts, such abstracts shall be made direct from the assessment lists."

You will note, therefore, that the assessment lists when bound "shall constitute the book of assessments."

When this method is used for preparing the **book of assessments** the other requirements of law are not changed, and as Section 57 requires the making of the abstract by the Tax Assessor, I cannot but advise you that under the specific terms of the statute, it is the duty of the Tax Assessor to make such abstract.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1937.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

A veteran who is entitled to an exemption under the provisions of Act No. 494 (Acts of 1935, page 1057), who fails to take out a license making proof of his disability and carries on a business without such license after the same has become delinquent and is cited by the license inspector is liable for all penalties and citation fees the same as if he had not been entitled to such exemption.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 1, 1936, in which you request my opinion as follows:

"Assuming that a citizen is entitled by reason of physical disability to exemption from payment of State and County licenses for the occupation he wishes to engage in, under the Act approved September 13, 1935 (Genl. Acts 1935, page 1057); but does not apply to the Probate Judge exhibiting his proofs, and requesting the issuance of his license until after November 1, when all occupational State and County licenses become delinquent:—

"Is the License Inspector entitled to have collected for his benefit, and is it the duty of the Probate Judge to collect from the applicant, 15% penalty, based on the amount of the applicant would pay, if he paid the money for his license, instead of taking it under his exemption privilege?"

The Act above referred to, i. e., the Acts of 1935, page 1057, which exempts veterans of various wars from privilege licenses does not mean that they can engage in business for which a license is required without such license, but under this Act, if they desire to take advantage of this exemption, such veterans must make application to the Probate Judge or to some officer authorized to issue licenses and when so doing must furnish the judge of probate or other officer, proof of their disability as set out by Section 8 of this Act, which is as follows:

"Proof of disability shall be made by exhibiting a Federal Government rated disability certificate to an extent of twenty-five per cent or more, or an affidavit from an examining physician of the United States Veteran's Bureau showing that the applicant for license is physically disabled to the extent of at least twenty-five per cent or by the production of a pension certificate issued by the United States Government or by the State of Alabama or by a certificate of the county health officer of the county in which the veteran resides, or if there be no county health officer a certificate by a reputable physician in the county in which the veteran resides, said physician's certificate to be attested before some officer authorized to administer oath."

Whenever the Judge of Probate is satisfied under the proof submitted that such veteran is entitled to such exemptions, he may allow the same and issue licenses to said veteran to carry on the particular business, but such veteran must have a license even though he is exempt from paying the amount required for such license and if he fails to make the proof and procure such licenses before the first day of November of any year and he engages in such business he is doing business without a license and it would be the duty of the license inspector to cite him for operating such business without a license and when so cited the party delinquent is subject to all the citation fees and penalties provided by law, based of course, on the amount of said licenses. The penalty and the citation fees grow out of the fact that the party was operating a business for which a license was required without taking out said license before same had become delinquent.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1937.

Hon. W. R. Carothers,
County Superintendent of Education,
Perry County,
Marion Alabama.

County Board of Education.—

Under Section 132 of the School Code of 1927, as amended by Acts of 1933, page 81, County Board of Education authorized to purchase real estate without the necessity of condemnation proceedings looking to that end.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"A mortgage executed by the Union District Academy for Colored People to the Planters & Merchants Bank, Uniontown, Alabama, with be-

tween \$4,000.00 and \$4,500.00 due thereon, was recently foreclosed by the said Bank and the property bought in by it at foreclosure sale. The colored people of Uniontown are now without a school building and lot and the rent demanded by the Bank for said building and lot is more than the colored people are able to pay. The Bank has offered to sell the building and lot which it purchased at foreclosure sale to the County Board of Education of Perry County for the sum of \$1,500.00 cash.

"Please advise me if, under Section 132 of the 1927 School Code of Alabama, as amended by the General Acts of the Extra Session of 1933, page 81, the County Board of Education of Perry County can make a direct purchase of this property from the Bank, in its name, and for public school purposes. Said Code Section, as amended by said Act, is not clear as to whether a direct purchase can be made by the County Board of Education, or whether condemnation proceedings will have to be had."

Section 132 of the School Code of 1927 as amended by Acts of 1933, page 81, provides:

"132. POWERS OF COUNTY BOARD. The County Board of Education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the Board and spread upon its minutes. All processes shall be executed by service on the executive officer of the Board."

This provision is broad enough to encompass direct purchase by the County Board of Education, without the necessity of condemnation.

If all other pertinent provisions of law are compiled with, I know of no reason why the County Board of Education of Perry County cannot purchase property referred to in your letter, for County School purposes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1937.

Hon. R. S. Duck,
Clerk, Circuit Court,
Bay Minette, Alabama.

1. Costs and Fees—Clerk of the County Court entitled to fee of fifteen cents per hundred words for making and certifying transcript on appeal to the Circuit Court.

2. Clerk of the Circuit Court and ex-officio clerk of the County Court are not entitled to pay for issuing warrant returnable to the County Court, under the General Laws of the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 26, 1936 in which you request my opinion as follows:

"Will you please give me an opinion on the following:

"1. The defendant was tried in the County Court, found guilty, appealed to Circuit Court and convicted there. The Convict Department has questioned my right to charge for making the transcript from County Court to Circuit Court. I have referred them to Sections 3667 and 3804 of the 1923 Code and to an opinion of the Attorney General, dated September 30, 1930, in the Biennial Report of the Attorney General from October 1, 1928 to September 30, 1930, at page 979, as my authority for charging this item.

2. The Convict Department has questioned my right to charge 50c for issuing a warrant in County Court. My authority for making this charge is Section 3667 and 3804 of the 1923 Code together with the ruling of the Attorney General dated May 11, 1933, found in the Biennial Report of the Attorney General from October 1, 1932 to September 30, 1934, at page 226."

Answering your first request under the authority of two opinions written by this office on June 10, 1935, to Hon. Hamp Draper, Associate Member, Board of Administration, Office Edition, Vol. 5-A page 76 and again on July 10, 1935 to Hon. G. C. Grantham, Clerk of the Circuit Court, Geneva County, Book 5-A page 96, I hold that you are entitled to this charge, that is, fifteen cents per hundred words for making transcript where defendant is convicted in the County Court and appeals to the Circuit Court. See Section 3667, Code of Alabama, 1923, where it says:

"Making transcript and certificate thereof (Per hundred words), fifteen cents."

Answering your second request, this depends on whether or not you are operating under the General Law as Clerk of the County Court, or whether you are operating under a local law which gives to you the authority to issue warrants and affidavits in the County Court and I am unable to find such local law for your County, therefore, I am presuming you operate under the General Laws and under such laws, you, as Clerk of the Circuit Court and ex-officio Clerk of the County Court, are without authority to issue such warrants as under the General Law, the Judge of the County Court or Justice of the Peace must issue such warrants. See Section 3815, Code of Alabama, 1923, therefore, you, as such clerk, not having authority to issue the same of course, could not be paid for so issuing. Biennial Report of the Attorney General, 1918-1920, page 287.

This opinion is not in conflict with the opinion of this office to which you refer, of May 11, 1933, Biennial Report of Attorney General, 1932-1934, page 226, as the opinion *supra* refers to the powers and duties of the Clerk of the Circuit Court and not to the Circuit Clerk as ex-officio clerk of the County Court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7 1937.

Hon. J. F. Smith,
Clerk, Circuit Court,
Escambia County,
Brewton, Alabama.

The fee of 25c in the Bill of Cost for a committing magistrate is a proper charge where it is included in Section 3753, Code of Alabama but if the cost of the preliminary is paid by the State it cannot exceed \$5.00.

Where persons employed by the State of Alabama are summoned to appear before a grand jury of the State, they are entitled to their compensation, i.e., their per diem and mileage.

Where two defendants are jointly indicted and sentenced to the penitentiary, separately and severally, the clerk would be entitled to 25c for sentence of each defendant.

Where a defendant is charged with a felony and is arrested under a warrant, charging a felony and is later convicted of a misdemeanor under said charge, the Sheriff would be entitled to \$4.00, the amount provided for the arresting of a felon.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 30, 1936, in which you request my opinion as follows:

"Please give me your opinion on the following:

"1st. In felony cases where a defendant has been arrested on a warrant sworn out by a Justice of the Peace and committed to jail pending action of the Grand Jury and is later on indicted by the Grand Jury, tried and convicted in the Circuit Court and sentenced to the penitentiary; would a charge of 25c in the bill of cost for the committing magistrate be a proper charge against the State Convict Department?

"2nd. Where persons employed by the State of Alabama are summoned to appear before the Grand Jury and courts of conviction, is it a proper charge against the Convict Department for their attendance as such witness? In event they are entitled to make a charge for such attendance, should they be allowed a per diem and mileage?

"3rd. Where two defendants are jointly indicted and sentenced to the penitentiary, each defendant being sentenced separately and severally, would a charge of 25c for the sentence of each defendant be a proper charge against the Convict Department?

"4th. Where, for instance, a defendant is indicted for a felony such as forgery in the second degree and said defendant is tried in the Circuit Court and found guilty of forgery in the third degree and sentenced to hard labor for the county, would the sheriff be entitled to a charge of \$4.00 for a felony arrest payable from the Convict Department, or would he be only entitled to a \$2.00 arrest for a misdemeanor?"

Answering your first inquiry, I am frank to say I do not know from your request just what the twenty-five cent fee you refer to includes; if it is for "complaint made before him or for each bond or undertaking of witnesses or for issuing each subpoena or notice or for an order to commitment to jail or for order of continuance or for execution for cost," my answer would be in the affirmative. Of course the cost of the court, i.e., the cost of the preliminary hearing if paid by the State cannot exceed Five dollars (\$5.00). See Section 3667 Code of Alabama, 1923.

Answering your second request I refer you to an opinion of this office written April 10, 1936, to Hon. Chas. W. Lee, State Comptroller, Vol. 3, Quarterly Report, Attorney General page 35; also an opinion to Hon. Walter K. McAdory, Chief of Alabama Highway Patrol, under date of July 9, 1936, Quarterly Report of Attorney General, Vol. 4, page 23. These opinions answer this part of your request.

Answering your third request, my answer is in the affirmative. I call your attention to Section 3739, Code of Alabama, 1923. This Section has to do with fees of clerks of the circuit courts and says in part:

"For entering sentences against each defendant, 25c."

Answering your fourth request, the sheriff would be entitled to \$4.00. See opinion of this office, written February 7, 1936, to Hon. Chas. W. Lee, State Comptroller, Vol. 2, Quarterly Report of the Attorney General, page 118, question 29.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1937.

Hon. J. C. Pattillo,
Clerk of the Circuit Court,
Clanton, Alabama.

1. Where a convict is sentenced to hard labor for the fine and cost and the cost is paid to the officers and witnesses under Section 3667, Code of Alabama of 1923, and the defendant later pays the cost, the same must remain in the State Treasury to the credit of the Convict Department.

2. The Clerk is entitled to commissions on all monies transmitted to the State.

3. Where money is paid to the County Treasurer that should go to the State, said payment being made by mistake or through a misinterpretation of the law, this money should be returned to the Clerk and the same transmitted to the proper custodian.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 20, 1936, in which you request my opinion as follows:

"Please render me your official opinion on the following statement of facts:

"Will Kennedy was convicted in the Circuit Court of Chilton County, Alabama, for the offense of violating the Prohibition Law and was fined \$50.00 and costs of court, besides additional hard labor of six months imposed by the Court. No part of the fine and costs was paid and the defendant duly sentenced to twenty-days for the fine, sixty-seven days for the costs and the six months additional hard labor, a total of six months and 87 days. On December 12, 1935, said defendant began serving and served until January 9, 1936. On January 9, 1936 a friend of the defendant paid to me, as Clerk of the Circuit Court, the full amount of the costs in this case, the same being \$49.85, and I am informed that this information was conveyed to the Governor and this defendant was paroled.

"Under Section No. 5518 of the Code of 1923, I disbursed to the State Treasurer, the solicitor's fee of \$30.00, less my 5% commissions, and also under the law, I disbursed to the State Treasurer and the County Treasurer, each, one-half respectively of the trial tax, less my 5% commissions, and also disbursed to myself and to the sheriff the respective clerk and sheriff fees and to the witnesses the witness fees due. After disbursing the cost in this manner the State mailed me a check for \$11.55, in payment of or refunding court costs under Section No. 3667 of the Code and I mailed to the State Board of Administration my check for this amount. It is the contention of the State Board of Administration that they are entitled to all of the court costs in this case and it is my contention under the law, that it is my duty to disburse this in the way the law says I must, as I have referred to above. The State Board of Administration refers me to 1928-1930 Opinions of the Attorney General, page 537, as authority to pay them all the costs in this case.

"It will be observed from the above state of facts that the defendant served something less than one month at hard labor, and as to whether this time he served will be given credit toward the costs or fine, I am not informed, but in any event he has not served sufficient time to pay the costs which was sixty-seven days.

"The first question I would like for you to advise me, is whether or not under the law and under the above facts, it is my duty to pay the solicitor's fee to the State Treasurer, as provided by Section No. 5518 and one-half of the trial tax each to the State and County Treasurers, as the statute provides and the Clerk's, Sheriff's and witness' fees to the respective parties, or to pay all of this cost to the State Board of Administration.

"If you hold that it is my duty to pay this cost to the State Board of Administration, then will you please advise me whether or not I am entitled to deduct 5% commission from the solicitor's fee and trial tax as the law provided when the same is paid to the State and County Treasurers.

"If you hold that this money should have been remitted to the State Board of Administration, then will you please advise me if the State and County Treasurers will be authorized under the law to pay back to me this money so paid to them?

"As to my authority in receiving the money, I refer you to the case of State v. Jordan, 23 Ala. App. 127, 122 So. 185."

Answering your first request, it is my opinion, and this office has so held, that if the defendant is sentenced to hard labor to pay fine and cost and the State has paid the cost under Section 3667, Code of Alabama, 1923, and the defendant has been delivered to the State and has begun his service, then, if the defendant comes in and pays the cost, this cost goes to the State Treasury and is placed to the credit of the Convict Department. Quarterly Report of Attorney General, Volume 3, page 188. I am enclosing you a copy of this opinion.

Answering your second inquiry as to your commissions when transmitting money to the State, I call your attention to the General Acts of 1931, page 669 Code Supplement, 1936, Michie, Sec. 7278 (1) which is as follows:

"Section 7278 (1) FEES OF CLERK AND REGISTER FOR COLLECTION OF MONEY.—The Clerks and registers of the several circuit courts of the State of Alabama shall receive five per cent of any sum or sums collected by such clerk or register for the State of Alabama as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums collected."

I think under the above section you are entitled to your commissions on all moneys transmitted by you to the State or any department of the State.

Answering your third request it is my opinion if you have paid this money to the County Treasury through mistake or misinterpretation of law that the County Treasurer is authorized to reimburse you so that the money may be sent to the proper custodian.

Extended September 2, 1936.

In order to clear up some items of cost referred to in the above opinion, which appears in Quarterly Report of the Attorney General, Volume IV, page 144, I am extending the same. In my answer to your first request where the opinion says "* * * then if the defendant comes in and pays the cost the cost goes to the State Treasury," of course, this could mean only such cost as is, taxable against the defendant on conviction, that is, the cost incurred by the State in prosecuting the case; and under no conditions could this include the cost incurred by the defendant in making his defense, in other words, the "defendant's" cost. The defendant's cost when collected goes to

the officers and defendant's witnesses and is never paid to the State, County or Convict Department. See opinion of Attorney General, Book 13-A dated August 14, 1936, addressed to Hon. J. E. Corbin, Deputy Clerk, Marshall County. Again, where the above opinion says "this cost should be paid to the State Treasurer and credited to the convict department," this does not include the trial tax but only the cost; trial tax is not a part of the cost of the prosecution but is a tax imposed on each and every case that goes on the docket of the Circuit Court and this tax should, under all conditions, be distributed as is directed by Section 9 of the Revenue Law of Alabama, 1935, page 11, which is as follows:

"Section 9. A trial tax of three dollars (\$3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: One-half ($\frac{1}{2}$) thereof into the general fund of the State Treasurer, and the other one half ($\frac{1}{2}$) into the general funds of the county in which the same is collected and for collecting and remitting such tax, the clerk or register may retain five per cent (5%) commission thereof. In all counties in this State where the clerk or register is paid on a salary basis under constitutional authority the five per cent (5%) commission provided for by this Act shall not be collected, but such clerk or register shall pay to the State and county respectively, each one-half of such trial tax."

The above section being a part of the Revenue Law of the State shows clearly that this item is not an item of cost but is a tax or revenue matter. Quarterly Report of Attorney General, Vol. 3, page 213.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 14, 1937.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Contractors allowed reasonable time after acceptance of contract by Governor to procure license required by 1935 Revenue Act, Schedule 42, Section 348, (General Acts 1935, p. 45).

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 30, 1936, in which you request my opinion as follows:

"A New Orleans firm of contractors has secured a contract to build the overhead bridge in Evergreen over the Louisville & Nashville Railroad on U. S Highway No. 31. This contract was let recently and the contractors have not begun work, not even as much as to move their machinery here.

"This morning I am in receipt of a copy of citation to the contractor for failing to take out license as a contractor, the citation having come through the mail and dated September 28th. At the same time I received a check from the contractor for his license as a contractor. I am reluctant to assess him the 15% penalty and (\$1.50) fee for the license before beginning operations. Indeed, I had a letter from him several days ago inquiring as to the amount necessary to purchase the contractor's license.

"Will you, therefore, give me an opinion immediately as to whether this contractor is liable for the 15% penalty and (\$1.50) citation fee to the license inspector, under schedule 42 page 200 of Revenue Laws of 1935?"

In reply to your letter, I wrote you under date of October 15, 1936, but upon further consideration, I desire to withdraw this letter and substitute therefor the following opinion. Also an opinion addressed to E. E. Wheelan, License Inspector of Jefferson County, under date of April 10, 1936, is modified in accordance with the following:

I am of the opinion that the contractor is not subject to a penalty under the conditions set forth by you. It is a fundamental rule in the construction of statutes that penal provisions must be strictly construed (See 59 C. J. Section 660, page 1113, and also Alabama cases cited therein under note 22).

As the purpose of the schedule requiring contractors to be licensed is to raise revenue and not to penalize the contractors, it is my opinion that the contractors should be allowed a reasonable time after the contract is accepted by the Governor to procure his license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 18, 1937.

Hon. H. L. Lazenby,
Tax Assessor,
Monroe County,
Monroeville, Alabama.

Taxation—Municipal Corporation—When municipal corporation adopts ordinance providing for the assessment and collection of taxes by county officers, under Section 201 of the Revenue Code of 1935, it is mandatory upon such county officials to perform the duties

therein required relative to the assessment and collection of such taxes.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"There are two incorporated towns in Monroe County with population under 1500. Both town councils want me as Tax Assessor to assess town taxes along with state and county taxes, and want collector to collect same. Kindly advise me if this is compulsory for us to assess and collect town taxes."

In my opinion, when a municipal corporation has duly adopted an ordinance providing for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided for the assessment equalization and collection of State and County taxes, it is the duty of the County Tax Assessor and the Tax Collector to assess and collect such taxes. Section 201 of the Revenue Code of 1935 Acts, Provides:

"Section 201. Any municipal corporation in this State, may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and County taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as may be fixed by the governing body of such municipality, not to exceed one-half of one percent for assessing and one-half of one per cent for collecting."

In this connection see also United States Fidelity and Guarantee Company v. State, 165 So. 71. (Ala. Sup.)

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 20, 1937.

Hon. Frank M. Johnson,
Judge of Probate,
Winston County.
Double Springs, Alabama.

Election Registrars — Board of Registrars not entitled to compensation for illegal session held under mistake of law.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"During last April the Commissioners' Court through an error, called the Board of Registrars together to register the young voters of this county which registration was illegal, because of the fact that the date to meet in April, 1936, did not apply to the small counties like Winston.

"After mailing their vouchers and not receiving their pay they made an investigation and found that they had worked 10 days which the State could not pay for and the young voters were not legally registered.

"We would like to have your opinion as to whether or not the Commissioners Court could pay the Registrars, at least a part of the regular salary as compensation for their services for the 10 day meeting in April out of the General funds of the County. Or would that be in violation of the law?"

In reply, I beg to advise that I know of no authority of law authorizing Commissioners Court to pay Registrars for services rendered under mistake of law. In my opinion, the fact that your Board of Registrars met and worked ten days in April, 1936, under the mistaken idea that they were complying with the requirements of the law, cannot authorize the Commissioners Court to pay the Registrars any part of the regular salary as compensation for their services.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 29, 1937.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Court House,
Birmingham, Alabama.

Court Cost — Cost taxed against State in tax appeals must be paid by the State and various taxing subdivisions thereof in proportion to the amount of taxes levied by each.

1. Cost bills should be apportioned according to the tax division of each political subdivision of the State.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 29, 1936, in which you request my opinion as follows:

"I understand that all of our cost bills against the State in the Tax Appeals from the Board of Review are being held up in your office, under Section 382 of the Revenue Code of 1935. Please advise what steps we might take to secure payment of these bills, and if we will have to render separate bills to the State, County and City of Birmingham in order to get them paid, and if these bills will have to be apportioned according to the tax divisions of each.

"I would appreciate any suggestion you might make as to the procedure for getting these bills paid."

In reply, I wish to advise you that Section 382 of the Revenue Code of 1935 provides as follows:

"Section 382. Any court costs taxed against the State, shall be paid by the State, and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. The sworn certificate of the Clerk or Register approved by the State Comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, and shall be treated as a preferred claim.

You will note particularly the first sentence of this section, which, in my opinion, commands that court costs which are taxed against the State shall be paid by the State and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. In my judgment this is applicable to tax appeal cases, and, therefore, necessitates the rendition of separate bills by the Clerk or Register to the State, County and City of Birmingham for the proportionate amounts due by each as calculated in accordance with the terms of the first sentence of Section 382 of the Revenue Code of 1935 quoted above. It is further my opinion that these bills should be apportioned according to the tax divisions of each, and remittance on each bill rendered should be made to the Clerk or Register, by the said subdivision affected.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 29, 1937.

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Seale, Alabama.

Taxation—Purchaser at tax sale, after expiration of period of redemption, entitled to deed from Judge of Probate upon presentation of certificate of purchase and payment of proper fee, regardless of tax payments subsequent to date of sale.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 6, 1937, which is as follows:

"At the 1932 tax sale held Nov. 27, 1933, the lands assessed to A were sold for 1932 taxes and at said sale B became purchaser of the lands for taxes and costs.

"A paid taxes on said lands for tax years 1933, 1934 and 1935, but A did not redeem from the 1932 tax sale. The time for redemption has not expired.

"B has surrendered his certificate of sale showing that he purchased the lands at the said tax sale, and asks that Tax Deed be issued to him.

"Under these circumstances am I permitted to issue Tax Deed to B. If not, how can B be reimbursed?"

I am of the opinion that your inquiry should be answered in the affirmative.

Section 241 of the Revenue Act of 1935, (General Acts 1935, p. 360) provides as follows:

"Section 241. After the expiration of three years from the date of the sale of any real estate for taxes, the Judge of Probate then in office must execute and deliver to the purchaser, other than the State, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the Judge of Probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the State and County thereto, but it shall not convey the right, title or interest of any reversioner or remainderman therein."

Said section in my judgment, is applicable regardless of the payment of taxes subsequent to the tax sale. The collection of said taxes is a matter for the tax collector. Your duties as Judge of Probate under said section are merely ministerial. Moreover, after the tax sale assessment should be made in the name of the purchaser.—**Quarterly Report of Attorney General, Vol. II, p. 241.**

The matter of A's rights under the above circumstances as one of a personal nature between A and B.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 29, 1937.

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

Attention: Mr. Mark L. Tucker.

Probate Judge not entitled to deduct 2½ per cent commission for citation fees and penalties in making monthly settlement with license inspectors.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 29, 1936, in which you request my opinion as follows:

"One of our license inspectors advises us that Probate Judge----- in making monthly settlements with him for citation fees and penalties deducts two and one half per cent commission.

"Please let us have your opinion as to whether or not said Probate Judge has legal authority for withholding said two and one half per cent when making settlement with the license inspector."

In my opinion, the probate judge is without authority to withhold 2½ per cent of the said citation fees and penalties collected by him when making settlement with the license inspector. Section 365 of the Revenue Law of 1935 states that the probate judge "shall be entitled to receive 2½ per cent of the **amount of money collected for licenses** due the State; which he may deduct from his remittance to the State Treasury * * * ." I do not find any provisions authorizing fees to be deducted or retained from citation and penalties.

The law of fees and costs must be held to be penal, and the law specifically provides that no fee must be demanded or received except in cases expressly authorized by law. **Code of Alabama, 1923, Section 7255.** Accordingly it is my opinion, that the law in this regard cannot be extended beyond its letter and the probate judge may not lawfully withhold for himself the fees mentioned in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 29, 1937.

Hon. Geo. E. Stone,
County Treasurer,
Mobile County,
Mobile, Alabama.

County Board of Revenue not authorized under the general laws of Alabama to pay mileage to an Assistant State Veterinarian.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 4, 1936, in which you submit the following inquiry:

"We have in our possession a warrant made out by the County Board in favor of Dr. J. M. Jowers for mileage in the use of his personally owned car in the work of T. B. Eradication in connection with cattle of Mobile County. The bill is all properly itemized, and I understand that similar claims have been paid in other Counties. Dr. Jowers is connected with the State Veterinary Department, and was making this inspection officially. Is the County liable for mileage under this condition."

It is my opinion that your question should be answered in the negative. Section 565 of the Agriculture Code of Alabama, as compiled in 1927, makes provisions for a State Veterinarian and also authorizes the State Board of Agriculture to pay him compensation and expenses.

Section 566, Agricultural Code, *supra*, authorizes the State Veterinarian, with the consent of the State Board of Agriculture, to appoint Assistant State Veterinarians.

Section 572 of the Agricultural Code, *supra*, authorizes the County Boards to make an appropriation for aiding in the suppression or eradication of infectious, contagious, or communicable diseases of livestock.

Section 587 of Agricultural Code, *supra*, makes it compulsory for the County Board of Revenue to provide a fund for tick eradication in the County.

Section 589, Agricultural Code, provides that the State Board of Agriculture may aid in the County defraying the County expenses of tick eradication, but not to exceed the sum of \$20,000 to any County during the fiscal year.

Section 579 of the Agricultural Code, *supra*, authorizes the County Board of Revenue to pay a salary to such inspectors as shall be required in the County. These inspectors are appointed and commissioned by the State Veterinarian, with the approval of the State Board of Agriculture, and are required to work under the supervision and direction of the State Veterinarian.

I am assuming from the facts stated in your inquiry that Dr. Jowers in an Assistant State Veterinarian, and that being true, he is an employee of the State of Alabama and not of the County. The State Veterinarian probably sends him into the various counties needing medical assistance in eradication work. Sections 565 and 566 of the Agricultural Code, *supra*, authorize the State Board of Agriculture to pay the State Veterinarian and his Assistants. It is not contemplated by the Legislature in the enactment of the several laws to which I have referred that the County should take care of any expenses of the State Veterinarian or his Assistants in the control and eradication of infectious or communicable diseases of livestock.

I do not think that Section .572, supra, which authorizes the County Board to make appropriations to aid in the work to suppress diseases of live-stock clothes the Board with any authority to pay mileage of the State Veterinarian or his Assistants. I think the aid there referred to is not the aid which is rendered by the State Veterinarian, but is confined to work authorized by other provisions of the Code to be done.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 2, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Tuscumbia, Alabama.

TAXATION — Interest to be charged on redemption from State of individual, application of rates set forth at end of opinion.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 14, 1936 as follows:

"An application has been filed with me for redemption of a tract of land which was sold to the State in 1928, for 1927 taxes. Please advise me whether I should charge interest on the amount for which the land sold at the rate of fifteen per cent per annum from the time the property sold in 1928 until the date of redemption or whether the rate of interest has been reduced for any of the intervening years which reduced rate of interest would apply in calculating the interest on the amount for which the property sold.

"Please also advise me what interest rate would be charged on the subsequent taxes which have accrued since 1928 and whether this rate of interest on the subsequent tax is uniform for each of the years in which the tax has accumulated from 1928 to the present. I desire particularly to know whether there is a different rate of interest on taxes for any of the subsequent years. I note that the rate of interest has been charged from time to time by various acts of the legislature but I do not understand how these various changes affect the subsequent taxes to be collected in cases of property sold to the State in 1928."

I have heretofore held that on redemption from the State of Alabama of lands sold for taxes, that the statutory rate of redemption, namely, of 15% interest on the taxes due the State at the time of the sale and 8% interest on subsequent taxes after maturity when the sale for taxes took place before September 15, 1932, and on tax sales after September 15, 1932, an

interest rate of 8% on the taxes due at the time of the sale and on subsequent taxes after maturity, prevailed, but on further consideration of the subject, including all the reasons for legislative enactments and the causes underlying the statutory changes made during the depression, I have reached the conclusion that the last paragraph of my opinion dated November 22, 1935, reported in Quarterly Reports of the Attorney General, beginning page 207 addressed to the Hon. Eugene Hawkins, Probate Judge, Birmingham, Alabama should be stricken and this opinion substituted therefor. I, therefore, substitute this opinion for said paragraph.

In approaching the conclusions which will appear in this opinion I think a brief reference to or summary of each and every statute since 1907, which, in my opinion, affects, controls, or sheds any light hereafter on the subject, is advisable. When I use the words "interest on the tax sale," or "interest on tax installments," or by using words of similar import, I refer respectively to interest on the taxes for which the sales were made and interest on installment taxes after the sale and from maturity thereof.

I shall attempt to list the statutes in their chronological order as nearly as I can, with brief reference as to the amount of interest provided in each enactment.

Section 2314 of the Code of 1907, for redemption of land sold to the State or to an **individual**, imposed an annual interest rate of 15% on the tax sale and an annual rate of 8% on subsequent installments.

Section 3110 of the 1923 Code of Alabama fixed an annual interest rate for redemption of lands sold to the State at 15% on the tax sale and 8% on subsequent installments. There was no change in the law of 1907.

Section 3111 of the 1923 Code of Alabama fixed the interest rate on land sold to an **individual** and for redemption from such sale there was no change in the law of 1907. The rate remained at 15% and 8%.

Act Number 157, General Acts of Alabama for 1931. The Legislature of 1931 enacted a law giving additional time for payment of taxes and also changing the interest rate for redemption of land sold for taxes. This Act was by this office declared unconstitutional and void. (Biennial Report for 1930-32, pages 264 and 308).

Act Number 19. General Acts of Alabama, 1932, page 17, approved September 15, 1932, and effective on that date, reduced the interest rate on sales to the State. This Act made the rates 8% on both the tax sale and the subsequent installments, but operated in the future and had no retroactive effect. (Biennial Report for 1932-34, page 167). This Act amended Section 3110, of the 1923 Code of Alabama.

Act Number 20. General Acts of Alabama, 1932, page 18, approved September 15, 1932, and effective on that date, reduced the interest rates on tax sales made to an **individual**, fixing an annual interest charge of 8% both of the tax sale and on subsequent installments. This Act amended Section 3111 of the 1923 Code of Alabama, and operated only in the future and had no application to sales made prior to September 15, 1932.

Act Number 194, known as the Revenue Act of Alabama, page 256, General Acts of Alabama for 1935, Section 269, reduced the interest rate on tax sales made to the State and on subsequent installments to 6% and, as I shall point out later, included sales made before and after January 1, 1935.

Act Number 194, (Revenue Act of Alabama) General Acts of Alabama, 1935, Section 270, fixed an annual rate of 6% for tax sales made to **another than the State**, but operated only as to tax sales made after January 1, 1935. The rate was 6% on the tax sales and on installments.

Act Number 194. (Revenue Acts of 1935) Section 290 thereof, provided that the provisions of Sections 269 and 270 of Act Number 194 should apply to all tax sales made **subsequent to January 1, 1935**.

Section 291 of Act Number 194, (Revenue Act) provided that on all tax sales made to the State before January 1, 1935, the annual interest rate provided for sales after January 1, 1935, should apply, except certain sales made within a certain period to the State could be redeemed without interest, provided application is filed before January 1, 1937. The rate of interest fixed by this Section was 6% on the tax sales and on the subsequent installments. Note that this change is confined to sales made to the State.

Section 291 of Act Number 194, was amended by Act Number 49, page 27, General Acts of 1936. This amendment merely changed the procedure for redemption, but did not change any provision with reference to reduction of interest as the Act originally provided.

Section 269 of Act Number 194 (Revenue Act) was amended by Act Number 256, page 1113 of the General Acts of 1935. This Act Number 526 was approved and became effective on September 14, 1935. This Act contained words relating to interest as follows: "to make such redemption shall deposit with the judge of probate of the county in which the land is situated, the amount of money for which the lands were sold **with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, together with the amount of all taxes found to be due on such land since the date of sale, as provided herein, with interest thereon at the legal rate prevailing from maturity of such taxes. * * ***"

Section 269 of Act Number 194, as amended by Act Number 526, was again amended by Act Number 56, Acts of 1936, page 30. The amendment was presumably made to avoid confusion as to whether or not act Number 526, above referred to, modified or affected the provisions of Section 291, Act Number 194 (Revenue Act) as to exemptions granted and also to change the procedure of redemption. No change was made in the wording (above underscored) which relates to interest.

Section 8563 of the 1923 Code of Alabama fixed the lawful rate of interest in Alabama at 8%, but this rate was changed by Act Number 37, Acts of 1935, page 69, and the change became effective on February 9, 1935.

My former opinion held that Section 269 as amended by Act Number 526, employing the words which I have underscored, referred to the Statutory rate for redemption imposed by Section 3110 of the 1923 Code of Alabama

on all sales made prior to September 15, 1932, when Act Number 20 was enacted by the 1932 Legislature, and that after that date, all sales carried a lower rate as provided by said Act Number 20. It is to be noted that Act Number 157, adopted in 1931, which was declared unconstitutional did not interrupt, alter, change, or modify the interest rate provided by Section 3110.

The Legislature did not see proper to change Section 270 of the Acts of 1935, page 256, and it is now the law that the interest to be paid for redeeming lands sold to an **individual after January 1, 1935**, is 6% on the tax sale and the same rate on subsequent installments, while the construction that I formerly gave to the words employed in Section 269, (General Acts of 1935, page 256) as subsequently amended in 1935 and in 1926, requires an annual rate of 15% on the tax sales and 8% on subsequent installments to be paid for redemptions of sales made to the State prior to September 15, 1932, and on sales after that date and until the present time, with continuous operation until changed, an annual rate of 8% on tax sales and on the subsequent installments. A difference of 2% on sales made to the State over sales made to individuals after January 1, 1935—the redemption charges to be paid to the State being higher than those to be paid an individual.

There is no statutory recorded evidence of any legislative effort from 1907 to 1931, to reduce or otherwise change the interest rate redemption of land; therefore, there must have been some economic reason for the reductions granted in the Acts set forth in this opinion. I feel justified in concluding that the severe economic depression during the last several years inspired the legislatures convening during this depression to reduce the burden of interest and penalties for redemption; also to reduce the lawful rate of interest in Alabama from 8% to 6%, effective on February 9, 1935, when Section 8563 of the 1923 Code of Alabama as amended was approved by the Governor. The reductions were reflections of efforts on the part of the United States Government to ameliorate the interest burden by the passage of laws making loans direct to farmers and to other borrowers; also reflections of a national desire to lessen all burden so that the common masses of people could make a living. Relief agencies were established, both direct and work. Millions were loaned to cities at low interest rate in order to provide work. The Congress enacted a law for a moratorium on mortgage foreclosures. The legislatures of Alabama during the depression joined hands with this worthy movement as evidenced by several laws with reference to interest. With the exception of the Act passed in 1931, these enactments by the Legislature of Alabama were by this office sustained as constitutional and held not violative of Section 100 of our constitution. A like ruling on the constitutionality of a similar statute in Louisiana, involving a constitutional provision similar to ours, was made by the Court of Appeals of Louisiana in the case of *State ex rel. Huggett, etc. vs. Montgomery*, 167 So., page 147. These extrinsic facts are strongly persuasive that the different legislatures of Alabama since 1930 have manifested a very pronounced determination to lessen the burden of interest on redemptions of land and on contracts.

Should I adhere to my former ruling that the legislature of 1935, after having passed a law exempting redemptions on sales within a certain period from all interest, after enactment of Section 269 and Section 270 reducing the interest to be paid, intended by Section 269 as amended in 1935 and in 1936 to revert to interest rate of 15% as provided by Section 3110 of the 1923 Code of Alabama for sales made prior to September 15,

1932, the date Section 3110 was amended, and 8% on sales made after that date, I would be ignoring, in my interpretation of the intent of the Legislature, the several inducements leading to the enactment of Section 269. In determining the intent of the Legislature, I must take into consideration the fact that the Legislature in amending Section 269 could have left out all reference to interest and by so doing, the interest provided by Section 3110 and that Section as amended in 1932 would have been the only law left governing the interest to be charged on redemptions from the State. I do not think I should interpolate words in Section 269 as amended in the following manner: "prevailing for redemption." Such interpolation contravenes the evident spirit and desire of the Legislature to help the masses of people. Also I find that my former opinion requires a higher rate of interest, namely 8%, to be paid on redemption of tax sales to the State since January 1, 1935, than is required in the same period, namely 6%, on redemptions from an individual. It was certainly not the intent of the Legislature to seek that advantage for the State. The author of the amended Section 269 might have intended the statutory rate for redemptions should prevail, but I don't believe that members of the Legislature in the amendment of Section 269 ever intended the statutory rate for redemptions should prevail, because a logical and reasonable construction of the wording does not so indicate their employment in that capacity.

I therefore, render an opinion as follows on the interest rates to be charged:

(1) When the State was the purchaser at tax sales made before February 9, 1935, the date lawful interest rates in Alabama were changed, interest at an annual rate of 8% should be charged on the amount of taxes for which the sale was made.

(2) When the State was the purchaser at tax sales made after February 9, 1935, interest at an annual rate of 6% should be charged on the amount of taxes for which the sale was made.

(3) When the State was the purchaser at tax sales before February 9, 1935, interest at an annual rate of 8% should be charged on subsequent tax installments which mature before February 9, 1935, and on those maturing after February 9, 1935, an annual rate of 6% should be charged. The interest, varying according to maturity, is to be charged from maturity.

(4) When the State was the purchaser at tax sales after February 9, 1935, interest at an annual rate of 6% on the amount for which the land was sold and at 6% on subsequent installments from maturity should be charged. The rate on the original taxes and on the installments is the same.

(5) When another than the State was the purchaser at sales made before September 15, 1932, the date Section 3111 was effectively amended, an annual rate of 15% on the amount of taxes for which the land was sold and an annual rate of 8% on the amount and from the maturity of subsequent installments should be charged.

(6) When another than the State was the purchaser at sales made after September 15, 1932, the date Section 3110 as amended became opera-

tive, an annual rate of 8% on the amount of taxes for which the land was sold and on the amount (from maturity) of subsequent installments should be charged.

(7) When another than the State was the purchaser at sales made after January 1, 1935, the date Section 270 of the Revenue Code became effective, an annual rate of 6% interest on the amount of taxes for which the land was sold and on the amount (from the maturity) on subsequent installments should be charged.

It is again to be noted that Act Number 157, General Acts of 1931, attempting to reduce interest rates on redemption was declared unconstitutional. Therefore, the interest rates set forth in that statute have no bearing on the subject. Also at this time all exemptions from interest provided by Section 291 of the Revenue Act have expired.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. Margaret Hornsby,
Custodian of School Funds,
Elmore County,
Wetumpka, Alabama.

Schools — County Boards of Education may employ attorney to prepare necessary papers, etc. in order to secure loan.

Opinion by Assistant Attorney General Screws.

Dear Madam:

I have your letter of December 28, 1936, which is as follows:

"On two different occasions this year, it became necessary for the County Board of Education of Elmore County, upon recommendation of the county superintendent, to borrow money to pay the salaries of teachers and meet current expenses, the funds on hand at such times being insufficient for such purposes. In each case, while the lender would agree to make the loan, it would not do so unless a competent attorney would supervise each step of the proceedings, the passing of the proper resolutions, the form of the minutes, the preparation of the written evidence of the debt with proper execution thereof pledging the school revenues for repayment of the loan and would make investigation of the amount of security pledged and recommend the sufficiency of such security. The lender also attached as a condition that the board would pay the attorney for such services. The board agreed to the terms and the loans were negotiated in pursuance of the agreement. The attorneys in due course presented their bill for such services, which fee the board considered reasonable and ordered paid.

"I understand that it has been suggested that the board is without power to pay a fee to an attorney merely for preparing minutes; but where, as here, the services of an attorney are necessary to effect the procurement of a valid loan I would like to know whether the claim for such fee is a legal one. Can the board pay such fee and contract to pay it under the general powers to sue and be sued and to contract, and can the custodian of school funds "properly pay the same on order of the board?"

I am of the opinion that your inquiry should be answered in the affirmative.

The rule relative to the employment of attorneys by County Boards of Education is set out in opinion of the Attorney General found in Biennial Report, 1930-32, page 763. The pertinent part of said opinion is as follows:

Section 132 of the School Code, 1927 provides that the County Board of Education may sue and contract, which provision, of necessity involves the liability of being sued. The authority to sue and to be sued, of necessity, carries with it the authority to employ and compensate counsel, when such Board is acting within the scope of its authority, and when counsel for such purposes has not been provided by law.— **Jack vs. Moore**, 66 Ala. 188; Biennial Report Attorney General, 1926-28, page 418.

"However, such agents as boards of education are without authority to employ counsel in cases where counsel may by law be provided, whether by special provision by statute or by implication. The law provides instances where the Board of Education is to be advised by the Attorney General or, by possible implication, by the County Solicitor; also, where the State is a party in interest directly or indirectly the law provides that the Solicitor and Attorney General shall prosecute or defend its interest. In such instances the Board of Education would not be authorized to employ counsel but must avail itself of the counsel provided by law — **Biennial Report Attorney General**. 1926-28, page 418, *supra*."

Applying the above rule in the instant case it is my opinion that the duties for which the attorneys were employed are not such as should be performed by the Attorney General or County Solicitor. Therefore, if the employment of an attorney for the purposes stated in your inquiry was necessary, same could be paid for by the County Board of Education. The question then presents itself as to whether or not the County Board of Education had authority to employ an attorney for the purposes as set out in your inquiry. In my judgment it has.

The services rendered by the attorneys, as outlined in your request, go far beyond the mere ministerial act of simply preparing the minutes of the Board. The demand of the lender of the money to the Board, under the facts outlined, is a reasonable and prudent one. The exercise by the Board of this power to borrow money to carry on its corporate functions is frequently and necessarily used. The exercise of this power and the necessity therefor was anticipated by the Legislature in the Acts of 1935 page 728, Sec. 9, and in a number of Acts of similar nature preceding it. There can be no question of the Board's power to employ an attorney to

represent it in litigation, whether it plays the role of plaintiff or defendant. This would naturally flow from the power to sue and be sued. I can see no real distinction between those cases where the Board employs an attorney in actual litigation and a case where it becomes necessary in the exercise of its functions to secure the services of an attorney to effect a legitimate objective. To deny the Board the power to contract, as outlined in your inquiry, would seriously hamper it, and in my opinion the Legislature never intended to impose such a restriction, but that on the contrary such a right is clearly implied.

The premises considered, it is my opinion that the County Board of Education had authority to employ an attorney for the purposes set out in your inquiry and payment for said services may be made from school funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. H. M. Brittain,
Chairman Commissioners Court,
Wedowee, Alabama.

1. County Commissioners of Randolph County not authorized to refund Circuit Clerk's commissions which he paid to County on Solicitor's fees collected, if Clerk has disposed of State bonds which the State Convict Department delivered to him.

2. County Commissioners not authorized to accept fine and forfeiture claims from Circuit Clerk in settlement of County's claim for excessive ex-officio fees paid to Circuit Clerk.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I refer to your letter of December 16, 1936 in which you write me as follows:

"In an examination recently made on the books and records in the office of the Circuit Clerk of Randolph County it was discovered that there was in the hands of the Clerk some Solicitor's fees which were due the county and had not been paid to the county until the end of the examination. The examiner charged these fees against the Clerk and upon demand made by the examiner the Clerk paid the full amount of said fees into the county treasury including his commission as allowed by law. The greater portion of these fees were contained in warrants

from the State Convict Department in 1931, which said warrants were not paid to the Clerk but were taken up by the State and bonds given in their stead. These bonds were made payable July 1, 1938.

"The Clerk has filed a claim with the Commissioners Court for the collection, or refund by the County, of his commissions on the above mentioned Solicitor's Fees.

"Please advise whether or not the Commissioners Court has authority to pay this claim.

"Also please advise whether the Clerk of the Circuit Court can pay or refund an excess collection of ex-officio fees paid to him by paying into the County Treasury claims against the Fine and Forfeiture Fund in the amount of the excess ex-officio fees collected by him."

You state in your letter that the Circuit Clerk received bonds from the State Convict Department in payment of warrants which he held for Solicitor's Fees, but you do not state whether or not these bonds are now in the custody and possession of the Circuit Clerk. If these bonds were given in payment of items due the Clerk as well as the County, the Clerk would be under no duty to deliver these bonds to the County in payment of the amount due the County, because the Clerk would be entitled to their possession and control as well as the County. If the bonds were issued solely for the payment of Solicitor's fees the Clerk would still be entitled to hold them because of his interest in the bonds. The Clerk has no right to dispose of or convert the bonds to his own use, and it is on the assumption that the Clerk has disposed of the bonds that I am holding as follows:

The County Commissioners of your County are not authorized to refund to the Circuit Clerk the commissions which he paid to the County in settlement of a debit made against him by the examiner. If the Clerk sold the bonds at a loss it was his duty to account to your County for the full amount of the Solicitor's fees without any deduction therefrom for losses incurred in the sale of the bonds. If the Clerk failed to account to the County within a reasonable time after the sale or other disposition of the bonds, he was properly charged with his commissions and he is not entitled to any refund for the payment thereof.

Answering your second question as to whether or not the County Commissioners are authorized under the laws of Alabama to accept fine and forfeiture claims from the Clerk in settlement of a claim the County has against the Clerk for excessive payment of ex-officio fees, it is my opinion that the County Commissioners have no such authority. The fine and forfeiture fund is contingent and the payment of claims against said fund is likewise contingent. The Commissioners are lawfully authorized to accept only cash in payment of said obligation of the Clerk. The Clerk was paid with money and he should repay the debt with money instead of fine and forfeiture claims.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Judges of Probate—Fiduciary funds on hand for a period of five years and unclaimed should be paid into the County Treasury and kept in a separate account for ten more years.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 27, 1936, which is as follows:

"At the time I became Probate Judge of Madison County my predecessor turned over to me fiduciary funds consisting mainly of amounts theretofore paid into the Probate Court for account of minors and unknown or non-resident heirs and never claimed by the owners.

"It appears that some of such funds were in the hands of the Probate Judge of Madison County for a period of five years or longer and still remain unclaimed. Would it be proper for me to pay into the County Treasury all such funds which have been held by the Probate Court for a period of five years or longer and that have not been claimed? If it be that I should pay such funds into the County Treasury, into what account should the County Treasury or Board of Commissioners place such funds? Do they become general funds of the County or must they remain segregated by the County? If it be true that I should pay this money into the County Treasury, what sort of release or order should be obtained or issued to properly discharge me from future liability for any such funds so turned over?

"I refer you to Chapter 352, Article 11, Sections 10465-6 of the Code of Alabama of 1923.

The answers to your inquiries are governed by Section 10465-10466, Code of Alabama, 1923. Said sections provide as follows:

"Section 10465.—Funds to be paid into county treasury after five years.—If at any time it should appear to the court, or be made known to the court, that any balance has been in the hands of any officer for a period of five years and the same remains unclaimed, it may make an order directing the same to be paid into the treasury of said county, and a separate account shall be kept of all such payments and so designated as to identify each transaction."

"Section 10466. May be paid out on order of court to owner.—Any person entitled to any amount so paid into the treasury or any part thereof may within ten years after such payment into the treasury recover the amount to which he may be entitled, without interest, by ob-

aining an order from the court under whose order the same was paid into the treasury. Such order may be made by the court on summary motion against the probate judge of the county after five days' notice unless the court for sufficient reasons continues the hearing to a further time."

It will be seen from the above that any fiduciary funds in your hands for a period of five years, which remain unclaimed, must be paid into the county treasury under order of the court. The court should immediately make this order when it ascertains that the funds have been in your hands for a period of five years where the same remains unclaimed. After the transfer is effected a separate account should be kept as to all payments and so designated as to identify each transaction. I suggest that you take receipts from the county treasurer when said funds are paid over to him.

The county treasurer in turn holds said money in separate accounts for a period of ten years after he receives same in order to meet any claim against said funds which might be filed within that time under Section 10466, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. J. R. White,
Board of Revenue,
Walker County,
Jasper, Alabama .

Counties — Under Act No. 379, H. 191, approved September 9, 1935, (General Act 1935, p. 803) known as the "County Financial Control Act," only one county officer, which is the Judge of Probate or the Chairman of the Board of Revenue or other governing body, or such officer as may be designated by such Board, may issue warrants against the General Fund payable out of the County Treasury or Depository.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 18, 1936, which is as follows:

It is the desire of the Board of Revenue of Walker County to pass appropriate resolutions authorizing the following:

"1. The Clerk of the Circuit Court of Walker County to issue jurors' certificates and witness certificates on the County Treasury for the payment of jurors and witnesses and authorizing the County

Treasurer to pay any jurors' certificates and witness certificates so issued or drawn and presented to him for payment.

"2. The Judges of the Circuit Court or either of them, to issue or draw checks or warrants on the County Treasury for the payment of the salaries of the Court Reporters and other claims legally incurred and to authorize the County Treasurer to pay any checks or warrants so issued or drawn and presented to him for payment.

"3. The Judge of the County Court of Walker County to issue or draw checks or warrants on the County Treasury for the payment of the salary of the Judge of the County Court and other claims legally incurred and authorizing the County Treasurer to pay any checks or warrants so issued or drawn and presented to him for payment.

Section 5 of the County Financial Control Act provides that warrants or checks drawn on the county Treasury shall be issued only by the Judge of Probate or Chairman of the Board of Revenue or **'such other officer as may be designated by such Board'**.

"I would like to be advised if the Board of Revenue of Walker County would have the authority by appropriate resolutions to authorize the Clerk of the Circuit Court, the Judges of the Circuit Court, and the Judge of the County Court to issue the jurors and witness certificates and checks and warrants for the purposes hereinabove stated. The Board of Revenue would like to pass these resolutions but does not want to do so unless we would be complying with the law."

Before specifically answering your inquiry, I wish to state that this office ruled that Act No. 379, H. 191, approved September 9, 1935, (General Acts 1935, p. 803), is applicable only to the General Fund of the County.—**Opinion to Judge of Probate, Elmore County, October 7, 1936; Opinion to Judge of Probate, Colbert County, October 7, 1936.** It has been also specifically ruled that it does not apply to the Fine and Forfeiture Fund.—**Quarterly Report of Attorney General, Vol. II, p. 62.**

Therefore, your inquiry involves only an interpretation of Section 5 of the Act under consideration as regards payments from the General Fund of the County. Said Section provides as follows:

"Section 5. — WHO SHALL ISSUE WARRANTS. No warrant shall be issued or check drawn on the County Treasury or County Depository by any person except the Judge of Probate or Chairman of the Board of Revenue, or like governing body, or such other officer as may be designated by such Board; and officers who are authorized to pay claims which have not been first approved by the Board, shall issue orders for warrants or checks which must be presented to the officer so authorized to issue warrants payable out of the County Treasury or County Depository."

It will be noted from the above that warrants can be drawn by only the Judge of Probate or Chairman of the Board of Revenue or other like governing body, or such officers as may be designated by such Board. The language of this Section is in the alternative and not in the conjunctive. In my opinion only one officer of the county may draw warrants against

the General Fund of the County. This officer may be the Judge of Probate or the Chairman of the Board of Revenue or other like governing body, or such other officer as may be designated by such Board. To hold otherwise would nullify the purpose of the statute which allows one party to be constantly familiar with the financial status of the General Fund by knowing the exact number of warrants drawn against said fund. In cases where the claims do not have to be approved by the Board, the officer who was heretofore authorized to issue warrants must now issue orders for warrants which must be presented to the one officer authorized to issue warrants against the General Fund payable out of the County Treasury or County Depository. **Quarterly Report of the Attorney General, Vol. I, p. 46.**

The premises considered, it follows that your inquiries must be answered in the negative with the exception of the resolution concerning witness certificates when same are payable out of the Fine and Forfeiture Fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. R. L. Mosley,
Clerk of Circuit Court,
Fayette, Alabama.

Justice of Peace entitled to fee of 25c for acknowledging complaint and 50c for issuing warrants returnable to County Court to be collected like other costs, even though case is not proessed or defendant found not guilty.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 15, 1936 in which you submit an inquiry as follows:

"Would you kindly give me a ruling as to whether or not Justice of Peace are entitled to 75c for issuing warrants and acknowledging complaints in cases before County and Circuit Courts, where the cases are either not proessed or defendants found not guilty. I am referring to cases that the Justice of Peace made returnable to either the Circuit or County Courts."

It is my opinion that a Justice of Peace who acknowledges a complaint and issued a warrant returnable to the County Court is entitled to a fee of 25c for acknowledging the complaint and a fee of 50c for issuing the warrant made returnable to the County Court. These fees are fixed by 3753 of the 1923 Code of Alabama.

I refer you to Section 3754, Code of Alabama, 1923, which reads as follows:

"3754. Same; how taxed and collected.—In prosecution before a Justice of the Peace where the case is not taken to the Circuit Court by appeal, or otherwise, the fees above specified, for such services as may be rendered in the case, must unless otherwise provided, be taxed by him as costs, and collected by execution, as in cases tried in the County Court; and, in all other cases, must be certified by him to the Court to which the proceedings are removed, or to which the process is returnable, and there taxed and collected like other costs."

The Justice of the Peace is entitled to the foregoing fees on complaints and warrants made returnable to the County Court to be collected like other costs, even though the defendant may be acquitted.

There is no authority of law for a Justice of Peace to issue a warrant returnable to the Circuit Court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Fees and costs accruing subsequent to sentence to work out fine and costs in misdemeanor cases are not lawful charges against the State under Section 3667 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of August 20, 1936, in which you state that this office has rendered conflicting opinions as to whether the State of Alabama can be lawfully charged under Section 3667 of the 1923 Code of Alabama for officers' fees accruing subsequent to judgment of the Court imposing punishment and sentence to work out the fine and costs for the commission of a misdemeanor. You cite the following opinions issued from this office:

Dec. 9, 1927	1926-28	PP 386
May 15, 1931	1930-32	PP 282
Apr. 21, 1932	1930-32	PP 791
June 13, 1932	1930-32	PP 877
Oct. 4, 1932	1932-34	PP 370
Nov. 15, 1933	1932-34	PP 426

Office Edition
1934-1936

Book No. 4-A	PP 207
Book No. 5-A	PP 293
Book No. 6-A	PP 223
Book No. 6-A	PP 227

Quarterly Reports

Oct. Nov. and Dec. 1935	PP 189
Jan. Feb. and Mar. 1936	PP 118
Apr. May and June 1936	PP 205
Apr. May and June 1936	PP 145

You give a statement of facts that a defendant after conviction and sentence for a misdemeanor took an appeal to the Court of Appeals; that the Court of Appeals affirmed the sentence; that the Defendant failed to appear within fifteen days and a forfeiture was entered against his bond and the Defendant is arrested and committed to jail; and that the Defendant is later received by the Convict Department and begins serving his time. You list certain items of cost, including a forfeiture, a capias, record for the Court of Appeals, guard fee, and a fee for executing the capias, and you ask this office for an opinion clarifying other opinions as to whether the State can lawfully pay these fees as provided by Section 3667 of the 1923 Code of Alabama.

I have investigated the opinions which you mention in your letter and I agree with you that there is a conflict which should be eliminated by a decision of this office as to which of the opinions referred to should be adhered to as a correct statement of law.

It is my opinion that all fees and costs to officers which accrue subsequent to judgment and sentence on a misdemeanor charge for the fine and costs are not a lawful charge against the State of Alabama under Section 3667, of the 1923 Code of Alabama.

All opinions or parts of opinions in conflict with this opinion are hereby respectfully overruled and/or modified to conform to this opinion, and each of the foregoing citations of opinions which are mentioned above not in harmony with this opinion is hereby modified and/or overruled to conform to this opinion.

The Legislature of 1927 passed an Act, Number 72, Acts of 1927, page 52, by the terms of which each of the counties of the State of Alabama is given an opportunity to deliver to the State Board of Administration of Alabama all county convicts who are sentenced to hard labor for the county. It is further provided that the State Board of Administration shall take these county convicts, work them, and make an accounting to the County annually of all net earnings of these county convicts. This Act also imposes upon the State Board of Administration the duty paying to all proper county authorities the items of cost provided in Section 3667 of the 1923 Code of Alabama. It is contemplated by this Act that the State of Alabama shall receive service from these convicts, but it was not the intention of the Legislature that the State of Alabama should profit through the transac-

tions, and for that reason Section 6 of the Act provided that all net earnings of the county convicts should be paid to counties to the credit of the Fine and Forfeiture Fund in the County.

It is my opinion that the Legislature at the time had in mind that on proper resolution by each County the State Board of Administration should be compelled to relieve the County of the burden of working the convicts. The Legislature was cognizant that the convict could be sentenced to hard labor only for the fine and costs accrued at the time of the sentence and that he could not be sentenced for any costs accruing subsequent to the day the sentence to hard labor for fine and costs was imposed. It well knew that the state of Alabama would be entitled to the labor of the convict only for the period of time covered by the sentence and judgment of the Court. Well knowing this fact, the Legislature provided that the net earnings of the convict should be paid to the County. The Legislature provided that all items of costs authorized to be paid under Section 3667 of the 1923 Code of Alabama should be paid to the proper officers. It is my opinion that these costs referred to only such items that had accrued at the time of sentence and for which the convict was sentenced to perform hard labor.

My conclusion that the items of costs to be paid under Section 3667, of the 1923 Code of Alabama are confined to those items which had accrued at the time of the sentence is strengthened by the provision of Act Number 72, supra, Section 6, directing all net earnings to be paid over to the County to the credit of the Fine and Forfeiture Fund, and further by the amendment of February 18, 1927, General Acts of 1927, page 45, to Section 4039 of the 1923 Code of Alabama, which provides that "it (the surplus) shall further apply to the fees of officers of the trial court, arising on an appeal, in cases where the Defendant has appealed from a conviction the punishment fixed being otherwise than imprisonment in the State penitentiary, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of an execution 'No Property Found.'" The amendment to Section 4039 of the 1923 Code of Alabama, General Acts of 1927, page 45, and Act Number 72, General Acts of 1927, page 52, were both introduced in the Senate and were both approved on February 18, 1927. It is my opinion that the Legislature had in mind that the State of Alabama should be charged under Section 3667 of the 1923 Code of Alabama with items of costs which had accrued at the time of the sentence for a misdemeanor and if there was any profit made by the convict, it should be paid by the State to the Fine and Forfeiture Fund of the County, and any subsequent costs accruing by reason of appeal should be a proper charge against the Fine and Forfeiture Fund. The Legislature evidently wanted the officers entitled to costs by reason of appeal to have some source of obtaining pay therefor, and for that reason it amended Section 4039 of the 1923 Code of Alabama so as to authorize these fees to be lawful charge against the Fine and Forfeiture Fund and it also provided in Act Number 72, which authorizes State Board of Administration to work County convicts, to pay to this Fine and Forfeiture Fund the net earnings of the convict.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 4, 1937.

Hon. Crews Johnston,
County Solicitor,
Barbour County,
Clayton, Alabama.

Licenses: Party operating automobile repair shop who also operates battery bench used exclusively for recharging of batteries, held liable for repair shop license (Schedule 13 of 1935 Revenue Laws) only.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 5, 1936, in which you request my opinion as follows:

"We have a man in our County Court charged with failing to procure a license for operating a battery shop as provided by Schedule 20 of the 1935 Revenue Code. The facts in the case are these:

"This party operates an automobile repair shop and has taken out a license therefor as provided by schedule 13 of the Revenue Code. In connection with his repair shop he has a battery bench and charger which he uses in charging dead batteries. He does not repair batteries other than recharge them.

"Will you kindly give me an opinion as to whether or not this man is liable for and subject to license under schedule 20?"

In my opinion a party operating an automobile repair shop and paying the license prescribed by schedule 13 of the Revenue Act of 1935, who also operates a battery bench and charger used exclusively for the recharging of batteries is not liable for the Battery Shop license levied by Schedule 20 of said Revenue Act.

I call your attention to an opinion of this office rendered under date of June 23, 1936, to Hon. W. W. Hill, Judge of Probate of Montgomery County, Alabama, (Quarterly Report of Attorney General Vol. III, page 184) wherein is found the following statement:

"Moreover, the repair of motor vehicles or trucks can well be extended to the repair of batteries, a battery being a part of the standard equipment of a motor vehicle.

Inasmuch as the party mentioned in your inquiry has procured the license required by law for those persons engaged in the repair of motor vehicles, and inasmuch as we have heretofore held that a battery is an integral part of such motor vehicles, I am of the opinion that said party need procure no other license than that prescribed by Schedule 13 which is as follows:

"SCHEDULE 13. For garages or shops where automobiles are repaired, painted, trimmed or welded for the public; Each shop where the work is done by one man, five dollars (\$5.00); each shop where the work is done by two men, ten dollars (\$10.00); each shop where the work is done by more than two men shall pay a license of ten dollars (\$10.00), and an additional license of five dollars (\$5.00) for each workman in excess of two so employed. Where garage or shop owners do work in shops they shall be counted as workmen. Provided the maximum number of men employed at any time during the license year shall be the basis of computing the license due."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 4, 1937.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Mortgages — No valid satisfaction of mortgage, as provided by Section 9023 of 1923 Code of Alabama, without attestation by judge of probate or his clerk.

Opinion by Assistant Attorney General Kohn.

I wish to acknowledge receipt of your letter of January 6, 1937, in which you state:

"The question of what is a valid mortgage satisfaction as outlined in section 9023 of the Code of 1923 has been called to my attention by one of our leading Tuscaloosa Attorneys and I have been requested by him to secure from you an opinion, the facts of which are as follows:

"A power of Attorney has been written and duly executed and acknowledged before a Notary Public and filed for record and duly recorded in this office. The Attorney in fact has marked the mortgage satisfied in full and did not request the Probate Judge to attest this satisfaction."

You request my opinion:

"Please give me an opinion as to whether or not this is a valid satisfaction under Section 9023 of the Code of 1923."

In my opinion your question should be answered in the negative.

The question of whether the satisfaction of a mortgage without attestation by the probate judge or his clerk amounted to a compliance with Section 9023 of the 1923 Code of Alabama, was passed on by our Supreme Court in the case of *Lewis v. Cannon*, 216 Ala. 515, 113 So. 577.

I quote from that case as follows:

"The requirement of attestation by the judge of probate, or his clerk, was designed, of course, to prevent unauthorized or fraudulent cancellations, and because, without such attestation, subsequent purchasers and incumbrances are not affected by the notice of payment or satisfaction, the statute intends to provide to the end that the owner, after he has paid or satisfied his debt, may be free to deal with his property as unincumbered. The entry of satisfaction alleged in count 2 was not a compliance with the statute, and defendant, on proof of the allegation, was liable as provided by section 9024 of the Code."

It is my opinion that under Section 9023 of the 1923 Code, no distinction is made between the satisfaction of a mortgage by the mortgagee himself, or by his attorney in fact, as the statute requires the attestation of the probate judge or his clerk in both cases. — **Biennial Report of Attorney General, 1928-1930, p. 811.**

The requirements provided by Section 9023 of the 1923 Code apply only to satisfactions in response to the demand made and not the voluntary entry of satisfaction of the mortgage. — **Blalock v. Windham**, 229 Ala. pp. 413, 157 So. 486; **Burns v. Burns**, 228 Ala. 61, 152 So. 48; **Sullivan v Williams**, 210 Ala. 363, 98 So. 186.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 5, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Officers—County Treasurer, or Treasurer appointed in lieu of County Depository, cannot act as clerk of the Board of Revenue or Court of County Commissioners.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 19, 1936, which is as follows:

"Please refer to Section 300-324 Inc., Code of 1923, and amendments thereto and advise me as follows:

"1. Where a person is elected under the general law to the office of Treasurer as Per Section 300, could such Treasurer also be and act, as Clerk of the Board of Revenue or Court of County Commissioners?

"2. When a person is appointed Treasurer in lieu of a Depository as per Section 322, could such person also be and act as Clerk of the Board of Revenue or Court of County Commissioners?"

I am of the opinion that both of your inquiries should be answered in the negative.

The employment of a clerk of the Board of Revenue or Court of County Commissioners under the general law is governed by Section 157 of an Act approved August 23, 1927, (General Acts 1927, p. 391), which employment is limited to duties concerning roads and bridges. **Biennial Report of Attorney General, 1930-32, p. 667.** The clerk employed thereunder is not, in my judgment, an officer. He is merely an appointee of the Board who has no term of office, no paid salary and may be removed at will. He is in my opinion a mere contractor. In other words, his employment is by virtue of a contract with the county.

The questions now to be determined are: (1) Can a County Treasurer under Section 300, Code of 1923, make such a contract of employment with the County, and (2) Can a person appointed Treasurer in lieu of a County Depository under Section 322, Code of 1923, take such a contract of employment with the County?

Section 5024, Code of 1923, provides as follows:

"5024. (7434) (5117) (3932) (4169) COUNTY OFFICER INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS. Any judge of probate, Tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

Said section specifically enumerates County Treasurers, and prohibits same from taking any contract for work or service with the county. It follows that your first inquiry should be answered in the negative.

The section above quoted includes "any other county officer" besides those officers specifically enumerated. The question then presents itself as to whether or not a person appointed Treasurer in lieu of a County Depository under Section 322, would be considered in the classification of "any other county officer" within the contemplation of Section 5024, supra.

In discussing the status of such an appointee the Supreme Court of this State in the case of *Jenkins vs. State ex rel Watson*, 219 Ala. 554, 123 So. 31, states as follows:

"We think, and so hold, that whether the individual so selected be termed a "treasurer" or "depository" he is the acting treasurer and is such a public officer or claimant to such office as to subject him to removal by quo warranto, under Section 9932 of the Code of 1923, when unlawfully holding the same. He is not a mere contractor. *State ex rel vs. Roberts*, 203 Ala. 325, 83 So. 49; *Michael vs. State ex rel Welch*, 163 Ala. 425, 50 So. 939."

Since the appointee in question is a public officer and his duties relate to only the county, he is, in my opinion, a county officer. And being a county officer he comes within the classification of "other county officers" as used in Section 5024, *supra*. Therefore, it follows that he is prohibited from taking a contract for work or services of the county; and your second inquiry should be answered in the negative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 5, 1937.

Hon. C. E. Sellers,
Tax Collector,
Pike County,
Troy, Alabama.

Elections — Poll Tax — All persons permanently disabled whose taxable property does not exceed \$500.00 exempt from payment of poll tax.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 22, 1937, which is as follows:

"(1) I would like to know under the new law if a man permanently and totally disabled is exempt from payment of poll tax.

"(2) A man who loses one arm at the shoulder is he exempt?"

The exemption from payment of poll tax of persons permanently disabled is now governed by subsection (g) of Section 2 of the Revenue Act of 1935. (General Acts 1935, pp 258). This provisions is the same as subsection 7 of Section 3022, Code of 1923. The exemption from the payment of

poll tax applies to all persons permanently disabled whose taxable property does not exceed \$500.00.

The party claiming the exemption will be exempt only from the time he first suffered his permanent disability. He would be due all poll tax since the adoption of the Constitution of 1901 to the time he became permanently disabled.—**Biennial Report of Attorney General, 1932-1934, p. 227.** Moreover, this exemption applies only to persons whose taxable property does not exceed \$500.00 at the time of claiming the exemption. This being true, a party who is permanently disabled should file claim for exemption each year because his taxable property may be in excess of \$500.00, and if so he would not be exempt from the payment of poll tax. **Biennial Report of Attorney General 1930-1932, p. 844.**

Concerning the proof of disability, this office has held that such is a matter to be determined by the Judge of Probate. In this connection, I wish to refer you to an opinion found in Biennial Report of Attorney General 1926-1928, p. 523. A voter claiming the disability has the burden of showing that such disability began before the tax became due and that his taxable property did not exceed \$500.00 at the time. Such disability must be one either physical or mental which materially impairs the voter's aptitude or capacity for earning a livelihood, no recurrent or intermittent maladies will bring a person within the exemption of this section.—**Shepherd v. Sartain, 185 Ala. 439, 64 So. 57.**

Definitely answering your second inquiry, I am of the opinion that the loss of an arm would not of itself exempt a voter from the payment of poll tax as far as physical disability is concerned. However, such, when taken in connection with other circumstances, may be sufficient to authorize the exemption. As above stated, this is a matter to be determined by the Probate Judge by an application of the rule laid down in the case of **Shepherd v. Sartain, supra.**

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 6, 1937.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Counties — No authority to pay for copy of testimony in habeas corpus proceeding to be furnished Solicitor.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 19, 1937, which is as follows:

"Mr. John Robinson, Attorney at Law here, advises me that he had a conversation with you over long distance telephone Monday night regarding your authorization of payment of the cost of securing a transcript of certain testimony of a habeas corpus proceeding in the case of the State vs. Lee James.

"It is my understanding that the Solicitor is desirous of a copy of the testimony of this proceeding, and that there is a provision whereby the Commissioners Court can pay the reporter for this transcript.

"As we have not had a matter of this kind to come before us we do not know of any authority that would pay a claim of this kind."

I am of the opinion that your inquiry should be answered in the negative. I find no authority whereby the County is authorized to pay for the expenditure in question.

This office has heretofore ruled that there is no authority for paying the Court Reporter for taking testimony in a habeas corpus proceeding. **Biennial Report of Attorney General, 1928-30, p. 1025; Quarterly Report of Attorney General, Vol. II, p. 198.**

We have also ruled that the Court Reporter is not required to furnish the State Solicitor with transcript of testimony taken at the trial of criminal offense, unless he is paid lawful charges therefor. **Opinion to Chief of Alabama Highway Patrol, on February 3, 1937.**

It will be seen from the foregoing that the Court Reporter is not required to furnish copy of transcript to the Solicitor, unless he is paid therefor. However, I find no authority of law which will authorize the County to make such an expenditure. It is well settled that the County may expend its funds only for purposes authorized by law or by necessary implication.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. T. B. Pearson,
County Superintendent of Education,
Washington County,
Chatom, Alabama.

February 17, 1937.

Schools—Custodian of county school funds may also be clerical assistant to county superintendent of education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 29, 1937, which is as follows:

"We are paying our custodian a salary of ten dollars (\$10.00) per month for clerical assistance to the county superintendent. Kindly advise if this is a legal expenditure of school funds."

I am of the opinion that your inquiry should be answered in the affirmative.

The provision for the employment of clerical assistance to the county superintendent of education is found in Section 169 of the School Code of 1927. (See Biennial Report of Attorney General, 1932-1934, p. 276).

I find no provision of law which would prevent the custodian of county school funds from being employed as a clerical assistant to the county superintendent of education. Moreover, Section 1 of Act No. 507, S. 424, approved September 13, 1935, (General Acts 1935, p. 1090), dealing with the custodian of county school funds, specifically provides that the said custodian may be the secretary to the county superintendent of education.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 17, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

License - License Schedule 56, General Acts of Alabama, page 460, does not apply to stores where electric light bulbs, standing or reading lamps are sold.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Schedule 56 of Section 348, Revenue Code, provides a license for the handling of electrical supplies. Please advise me if, in your opinion, this license applies to a person operating a place of business that handles merchandise such as groceries and dry goods.

"The examiners have found a case where a chain store is handling electric light bulbs, standing or reading lamps. Would such license apply to such business?"

It is my opinion that your question should be answered in the negative.

Schedule 56 enumerates certain electrical appliances and articles of merchandise and subjects them to a license tax. It then proceeds to levy a license tax on an electrical supply shop.

I think that electric light bulbs, floor and reading lamps are electrical gadgets or appliances, but are not electrical supplies. If it had been the intention of the legislature to levy a tax on the articles mentioned in your letter, it occurs to me that they would have enumerated these appliances as they did electric water heaters, electric stoves and electric refrigerators. The articles enumerated in this schedule might be construed as household electrical equipment and likewise the articles in your letter might be so classified.

I, therefore, hold that a store handling the electrical goods mentioned in your letter is not subject to the license tax imposed by Schedule 65, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 23, 1937.

Hon. S. J. Gray,
Board of Registrars,
Mobile County,
Mobile, Alabama.

Elections — One convicted of a felony in Federal Court before becoming naturalized must nevertheless have civil and political rights restored by Governor of Alabama before being entitled to register after becoming naturalized.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 22, 1937, which is as follows:

"We have an applicant for registration who recently became a naturalized citizen of the United States. Prior to the time he received his naturalization papers he was convicted in the Federal Court of violating the prohibition laws, receiving a sentence of a year and a day and served his time. He contends that since he was not a citizen at the time of his conviction it is not necessary that his civil rights be restored by the Governor of Alabama. Please let us have your opinion as to whether or not it will be necessary for his civil rights to be restored by the Governor of Alabama before he can be accepted as a qualified elector."

I am of the opinion that your inquiry should be answered in the affirmative.

This office has heretofore ruled that one who has been convicted of a felony in the Federal Court must have his civil and political rights restored by the Governor of this State before being authorized to vote.—**Biennial Report of Attorney General, 1930-32, pp. 742; Quarterly Report of Attorney General, Vol. II, pp. 235. 252.**

The question then presents itself as to whether or not this rule would apply to one who was convicted of a felony in the Federal Court before he became a naturalized citizen. In my judgment it does. The disqualification provisions of the Constitution of 1901, (Section 182), and of the Code of 1923, (Section 364) both refer to persons rather than citizens. The word "persons" is used in each instance and no reference whatsoever is made to citizenship or inhabitance. This being true it follows that it is immaterial as to whether or not the person so convicted is an alien or a naturalized citizen.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 23, 1937.

Honorable Charles W. Lee,
State Comptroller,
Capitol.

Education — County Boards of Education or City Boards of Education authorized to use matriculation fees in paying secretarial salary, school equipment and supplies.

School trustees are not authorized to use incidental fees collected from pupils to pay for school equipment, supplies and secretarial salary.

Manner in which Jean Fund may be used by Board of Education is not regulated by laws of Alabama, but may be used according to the terms of the trust agreement.

County Board of Education may in some instances employ an attorney.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which is quoted as follows:

"The Examiners of Accounts have found that the County Board of Education in certain counties is using the Incidental Fees to pay for the following items, to-wit:

- "(1) Salary of Secretary to the High School Principal.
- (2) Purchase of Band Instruments.
- (3) Purchase of Sound Equipment for use in a pageant.
- "(4) Purchase of Flowers for use in a pageant.
- (5) Purchase of a Frigidaire.
- (6) Purchase of Lumber, Nails, Paint, etc. for use in Manual Training Department.
- (7) Purchase of Thread, Cloth, Patterns, Groceries, etc. for use in Home Economics Department.

"I. Has the Board of Education, Board of Trustees or High School Principal authority to use the Incidental fees in paying for the above mentioned items? Refer to opinion of Attorney General, page 206 1926-28 report.

"II. Has the Board of Education, Board of Trustees or High School Principal authority to pay the expenses of a worker, that is employed under the law, known as the Jean Fund, while said Worker is attending Summer School?

"III. Has the County Board of Education authority to pay an Attorney a fee for rendering an opinion to said Board, where the Attorney draws a regular salary from the Board as an employee?"

It is my opinion that the County Board of Education or the City Board of Education, as the case may be, has authority to use matriculation fees to pay for items 1 to 7, inclusive, mentioned in your letter, but it is further my opinion that school trustees who have collected incidental fees pursuant to authority set forth in Sec. 182, (now repealed) Alabama School Code, 1927, have no authority to use the incidental fees to pay for items 1 to 7, inclusive, or any of them.

The right to purchase or pay for the items mentioned in your letter depends upon whether legislative authority has been given for that purpose. If legislative authority has been given then it must be within the constitutional limits. The constitutional right of the Legislature was decided favorably in the case of Vincent vs. County Board of Education of Talladega County, 131 Southern Reporter, page 293 in which the court held that Section 467, Alabama School Code, 1927, was constitutional. I quote Section 467 as follows:

"467. A matriculation fee may be collected for each semester from all pupils in accredited high school, including County High Schools, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be, and the proceeds of such fees shall be expended under the direction of the County Board of Education or the City Board of Education as the

case may be. A reasonable fee for library, laboratory and shop work may be required, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be."

The first sentence of this section authorizes the school authorities therein named to collect a matriculation fee for each semester for all pupils in accredited high schools, and provides that the proceeds of said collection shall be expended under the direction of the County Board of Education or the City Board of Education as the case may be. There is no restriction as to how and for what purposes these funds may be spent. The second and concluding sentence of Sec. 467 authorizes the imposition of an additional fee for library, laboratory and shop work, the amount to be determined by the County Board of Education or the City Board of Education as the case may be.

Your request does not state whether the items purchased were for use in an accredited high school or to be used in a grade school. The last three items mentioned in your letter evidently were used in a high school as a grade school would probably have no use for such items. Hence, Sec. 467, supra, contains no restrictions as to how and for what purpose matriculation fees may be used, but leaves the matter entirely in the hands of the school authorities therein named, and I can see no reason why the items mentioned in your letter were not lawful purchases out of the matriculation funds.

Such items could not be lawfully purchased with incidental funds collected from pupils as authorized by Sec. 182, supra, which I quote as follows:

"182. The Board of School Trustees shall have the power with the approval of the County Board of Education to fix and collect a reasonable incidental fee to be paid by each pupil entering the school. Monies received from such fees shall constitute an incidental fund subject to use for repairs, improvement of grounds, insurance and other incidental expenses. The principal teacher of said school shall be the custodian of the incidental fund, shall keep an accurate account of the same, and pay the same out on the order of the Board of Trustees. Such custodian shall make report to the County Board of Education at least once each year of receipts and disbursements, and whenever requested by said Board to do so."

The use of the fund so collected under the foregoing section is restricted by express provisions of the law. Funds must be used for purposes incidental to the operation of the school. They may be used to make repairs on the school building, to improve the grounds, to pay insurance and for other incidental expenses. Reference is made to an opinion of Mr. Chas. C. McCall, Attorney General, to Hon. E. L. Hays, reported in Biennial Report 1926-28, page 206, 207.

I invite your attention to an act of the Legislature, General Acts of 1935, page 1092, the effect of which is to repeal section 182, supra, by specific reference. Since said Act was approved by the Governor, it has not been lawful to charge incidental fees as previously authorized by Sec. 182. Therefore, no question as to the use of incidental fees collected since the repeal of Sec. 182 can arise.

I am informed by the State Department of Education that the Jean Fund is a philanthropic donation deposited with the State Board of Education under a trust agreement as to how the money may be used. Violation of the trust agreement by the State Department of Education might work a forfeiture of the Trust Fund, but it would not violate any statutory law in Alabama. It is my information that the trust fund was set up to provide training for special negro teachers who are selected by the State Department of Education, and that being true, the expenses of a negro teacher or worker while attending summer school could be paid.

With reference to your third question, I am not able to give you an answer for the reason that you do not give sufficient facts for me to form an accurate opinion. There are some instances when the County Board might be lawfully authorized to pay the attorney an additional amount for his services. If an attorney were employed by the School Board at a stipulated fee or salary and for that remuneration the attorney obligated himself to advise the School Board, then he would not be compelled to do any work for the School Board which was not within the terms of his contract. For instance, if an attorney were given a retainer's fee of \$50.00 for one year as payment for advice, the attorney would not, under the contract, have to prepare all the proceedings necessary to issue anticipation-warrants or to prepare other proceedings which the Board might want him to do. The mere fact that the attorney is paid a retainer fee or draws a salary from the Board of Education would not necessarily exclude payment to him of another fee. The attorney would be expected to carry out his contract and he could not lawfully be paid an extra fee for performing services which he obligated himself to perform under the terms of the contract with his employers.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 24, 1937.

Hon. R. E. Adams,
Probate Judge,
Escambia County,
Brewton, Alabama.

Act No. 462, General Acts for 1935, page 990, does not prohibit County Commissioners of Escambia County from paying claims for telephone designated under Act No. 187, General Acts for 1933, page 201.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter in which you submit an inquiry as follows:

"Please refer to Act No. 462 on page 990 of the General Acts of the Legislature of 1935 and let me have your official opinion as to whether this act prohibits the Courts of County Commissioners from paying the claims for telephones and telephone services for County Offices not included in this Act, or if this act merely changes the order of priority of payment of telephone bills for the offices mentioned in this Act."

Act No. 187, General Acts of 1933, page 201, authorizes the Board of Revenue or Court of County Commissioners to designate which offices in the Court House may have telephones installed therein.

The authority granted by this Act carries with it authority on the part of the County Commissioners to pay for such telephones as they designate pursuant to the terms of the foregoing Act. I refer you to an opinion of this office dated January 22, 1936, to Hon. Cecil H. Strawbridge of Vernon, Alabama, Quarterly report of the Attorney General, Vol. II, page 54.

Act No. 462, General Acts of the Legislature of 1935, page 990 fixes and establishes priority of payment of claims for telephones installed in the offices of the officials designated in the Act, but does not, in my judgment, repeal, alter or modify the authority granted to the Boards of Revenue or Courts of County Commissioners by Act No. 187, supra. to designate which offices in the Court House may have telephones installed therein. It is my opinion that the County Commissioners of your County may designate which offices in the Court House may have telephones.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 24, 1937.

Hon. T. B. Pearson,
County Superintendent of Education,
Washington County,
Chatom, Alabama.

Schools — Bond of County Superintendent of Education now payable out of School Funds. Statement of receipts and disbursements and annual report of County Board of Education paid out of School Funds. If these expenditures are paid by county governing body refund may be made by County Board of Education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 23, 1936, which is as follows:

"In checking the records of the Court of County Commissioners, Washington County, Mr. Grubbs, Assistant Examiner of Accounts, charged to the Probate Judge of Washington County the amount of thirty-six dollars (\$36.00) for payments on the bond of the County Superintendent of Education. Since the passage of the Bains Act these bond premiums should have been paid by the County Board of Education. The Probate Judge of this county has presented us with a bill for the said \$36.00, and requests payment of same from the County Board of Education. Kindly advise if this would be a legal expenditure of county school funds. Should we pay this account to the Probate Judge for General Fund of Washington County.

"In like manner a charge of one hundred eighty - nine dollars (\$189.00) was charged to the Probate Judge for payment to the local newspaper for publishing the annual report of the County Superintendent. Kindly advise if we may legally pay to the Probate Judge this amount from the school funds of Washington County."

I am of the opinion that both of your inquiries should be answered in the affirmative.

Under Section 20 of Act No. 191, H. 344, approved April 20, 1933, (General Acts 1933, p. 203), the premium on the bonds of County Superintendents of Education and County Treasurers of School Funds (now Custodians of County School Funds) shall be paid by the County Board of Education out of the three mill school tax. This Act changed the law heretofore in existence that said premiums were paid by the county governing body.

In an opinion of this office found in Biennial Report of Attorney General, 1930-1932, p. 110, it was held that the expense of printing the statements of receipts and disbursements and of the annual report required by Section 123 of the School Code of 1927, must be paid out of the educational fund of the county by the County Board of Education and not by the Board of Revenue or Court of County Commissioners.

If the above payments were made by the county governing body instead of by the County Board of Education, refund should be made to said county governing body by the County Board of Education. Therefore in my opinion you may legally pay out of school funds the refund due the General Fund of Washington county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 26, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Gin Company engaged incidentally in buying cotton not liable for license imposed on parties whose "principal business" is buying cotton.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 18, 1937, in which you request my opinion as follows:

"I call your attention to schedule 43 of Section 348 of the Revenue Laws of 1935, page 456.

"Ware-Darby Gin Company of this city is engaged in operating public gins in this and Lauderdale counties. In connection with these gins, they buy cotton. Buying cotton is not, I am reliably informed, their principal business.

"Should they be required to take out cotton buyers license?"

In my opinion, the Ware-Darby Gin Company mentioned in your letter would not be liable for license imposed by Schedule 43 of the Revenue Laws of 1935 upon persons whose principal business is buying cotton, inasmuch as you state in your letter buying cotton is not the **principal business** of this firm.

Schedule 43, supra, provides as follows:

"Each person whose principal business is buying cotton, shall pay one state license of Twenty-five Dollars (\$25.00), and shall also pay a license of Ten Dollars (\$10.00), in each county in which such person shall maintain an office or buy cotton."

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In the case of Equitable Building and Loan Association v. State; 168 So. 695, it was held that "Principal Business" as found in Schedule 70, Section 361, General Acts 1919, pp. 395, 419, is a mere matter of Classification and nothing more." However, I do not believe that this definition is applicable when applied to the facts in the instant case. It appears to me that the word "principal" must be given its commonly understood meaning, i. e. "main; leading; outstanding; important" (Webster's New International Dictionary, Second Edition). Adopting this definition it is clear that the Gin Company mentioned in your inquiry is not liable imposed by Schedule 43.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 1, 1937.

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama.

County School Board operating under General Laws of the State has authority to elect a County Superintendent of Education for a

period of four years, and at the time of such election to fix a reasonable expense allowance as a part of the compensation of such Superintendent of Education; but the County Board of Education is not authorized, in the midst of the term of such County Superintendent of Education, to grant an expense allowance.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 16, 1936, which is as follows:

"Please advise me on the following situation: The Board of Education of Cullman County appointed Mr. R. E. Moore as county superintendent of education for a term of four years, beginning July 1, 1933. The Board fixed his salary at a stated sum, but allowed no travel expense account for the reason that it was the view of the Board that at that time such an allowance was considered illegal.

"When the Attorney General in an opinion dated August 19, 1935, held that county boards of education have authority under the general law to fix, in their discretion, the contract of employment of the county superintendent of education and have authority to provide expense accounts, the Board of Education of Cullman County by resolution voted Superintendent Moore an expense allowance effective July 1, 1935.

"Please advise me whether the Board of Education was within its legal rights in voting the above mentioned travel expense."

I am of the opinion that your inquiry should be answered in the negative.

In an opinion of this office rendered to the State Comptroller on August 19, 1935, to which you refer, it was held that under the general law County Boards of Education have authority to fix the salary of County Superintendents of Education, together with an expense account, as part of the contract of employment. The expense account referred to in said opinion was fixed at the time the salary was fixed. In other words, the total amount of the compensation was fixed at the beginning of the term of office of the County Superintendent of Education. Said holding was not in conflict with the case of Woodruff v. Beeland, 220 Ala. 652, 127 So. 235. The said case dealt with a Local Act. It held that under the wording of the local act, there was no authority for the County Board of Education to allow the County Superintendent of Education the expense allowance involved in that case. The court in said case pretermitted a consideration of the question of whether or not an expense allowance could be considered as part of the salary which the County Board had authority to fix; neither did the court discuss the authority of Boards of Education in Counties where the boards elect and fix the compensation of Superintendents of Education. The opinion of this office above referred to was based on the theory that the salary and expense allowance, which were fixed at one and the same time are considered as a total compensation.

In the instant case the additional expense allowance was fixed after the County Superintendent began his term of office with a fixed salary. If it be considered as part of his compensation, such would amount to increase in the compensation of the County Superintendent during the term for which he was appointed or elected in violation of Section 281 of the Constitution of 1901.—*McMurry v. Franklin County Board of Education*, 216 Ala. 144, 112 So. 644.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 3, 1937.

Mrs. Annie P. Hardenbergh,
Probate Clerk, Hale County,
Greensboro, Alabama.

Probate Judge — When vacancy exists duties of Probate Judge are performed by Chief Clerk pursuant to Sec. 9594, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

My dear Madam:

Reference is made to your inquiry as to who performs the duties of the Judge of Probate in case of his death and seeking information as to how funds deposited to the credit of the Probate Judge are to be handled, who makes the reports, how are remittances to be made, and who signs the county warrants.

I refer you to Sections 9592 and 9594, both of which I quote as follows:

"9592. **AUTHORITY OF CHIEF CLERK.** — The chief clerk has the following powers—

"1. To issue letters testamentary, of administration, and of guardianship, where there is no contest.

"2. To administer oaths relating to the business of the court, and take and certify acknowledgements and proof of instruments authorized to be recorded.

"3. To solemnize matrimony, approve bonds, and appoint guardians ad litem.

"4. To admit wills to probate and record, and to pass and allow accounts of executors, administrators and guardians, where there is no contest.

"5. To do all other acts and things and perform all other duties, ministerial and judicial, where there is not contest, that the judge of probate could do and perform, except to hear and grant writs of habeas corpus and writs of certiorari. All of the official acts of such chief clerk must be performed in the name of the judge of probate except when there is a vacancy in that office."

" 9594. (5432) (3374) CHIEF CLERK CONTINUES TO PERFORM DUTIES OF OFFICE PENDING VACANCY, Etc.—Whenever a vacancy shall occur in the office of the judge of probate, the chief clerk in that office, appointed and qualified as authorized by law, shall, during such vacancy and until the qualification of a lawful successor, perform all the duties of that office which he is authorized by law to perform where there is no vacancy, but must not receive money on decrees or executions, or become the custodian of trust funds pertaining to the court. He may make all necessary orders for the continuances of causes and proceedings pending in the Court. All such duties are to be performed, during such vacancy, by such chief clerk in his own name as clerk of the probate court, and he is entitled to the lawful fees therefor. For his official acts hereunder such chief clerk and the sureties on his bond to the judge of probate, shall be liable to persons injured, according to the legal effect of official bonds as declared by statute. If such chief clerk shall fail or refuse on demand to deliver all the books, papers, property and money belonging or appertaining to such office, to the lawfully qualified successor of the judge of probate, he may be proceeded against under the provisions of this Code to compel the delivery of books, papers, property, and money by public officers to successors.

You will observe that Section 9594, supra, authorizes the chief clerk of the probate court, in case of a vacancy, to perform all the duties which he is authorized by law to perform when there is no vacancy, such duties being authorized by Section 9592, Code of Alabama, 1923, but the chief clerk must not receive money on decrees or executions, or become the custodian of trust funds pertaining to the court. His duties are to be performed in the name of the chief clerk.

With reference to the request for specific information contained in your inquiry, it is my opinion that the chief clerk in his or her own name, is authorized to remit money which has been deposited to the credit of the probate judge, is given the right to make reports which was a duty of the probate judge to make, and, except in cases of contest, to perform duties, ministerial and judicial, which the probate judge could do and perform, except to hear and grant writs of habeas corpus and writs of certiorari. The chief clerk has been given a wide latitude in carrying on and performing the work of the probate judge, and in my judgment, he is authorized to sign warrants.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 4, 1937.

Hon. G. E. Alday, Sheriff,
Washington County,
Chatom, Alabama.

Sheriff is not entitled to pay out of the fine and forfeiture fund for the county for serving witnesses to appear before the Grand Jury where no indictment is found.

Second — Sheriff would be entitled to pay for serving witnesses to appear before the Grand Jury where there was an indictment and the defendant later acquitted, State enters a nolle prosequere or prosecution abated by death of defendant.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 26, 1937, in which you request my opinion as follows:

"Please furnish me with the following opinions:

"Would Sheriff be entitled to file claims against Fine and Forfeiture Fund for serving subpoena issued by Clerk for witness to appear before Grand Jury when no bill is found.

"Would service for serving subpoena for witness to appear before Grand Jury, where indictment is found and defendant against whom bill was found was discharged by court or case nol prossed by the court would this be a legal charge against Fine and Forfeiture Fund?"

My answer to your first inquiry is in the negative, based on an opinion of this office written July 3, 1935, Attorney General's Report, Office Edition, Book 5A, page 11, and also on *Kilgore v. Swindle*, 122 So. 333.

My answer to your second request is in the affirmative. That is, where the sheriff subpoenas witnesses before the Grand Jury which returns an indictment and on the trial in the Court the defendant is acquitted, the case is nol prossed or abated by death.

It is my opinion under these circumstances you would be entitled to your fee for serving witnesses to appear before the Grand Jury in such cases. *Kilgore v. Swindle* 122 So. 333.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1937.

Hon. Saxon P. Poyner,
Judge of Probate,
Dothan, Alabama.

1. License Inspector not entitled to citation fee of \$1.50 in cases where citation was served by lawful officer other than License Inspector, but such fee should be paid officer serving citation.

2. Citation fee of \$1.50 due State Highway Patrol officer for serving license citation on delinquent should be paid to Highway Patrol Fund.

3. License Inspector not on a salary is entitled to a penalty of fifteen per cent payable to Probate Judge by delinquent even though citation is served by another lawful officer.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of December 2, in which you submit the following:

"We have several citations filed in our office and some of which have been collected for which were served by the State Patrol.

"Please advise who is entitled to the citation fee when same is served by the State Patrol or any other officer other than License Inspector.

"Who is entitled to the delinquent fee of fifteen per cent when the citation is served by an officer other than the License Inspector?"

Responding to the above inquiries, it is my opinion as follows: (a) That any lawful officer of the State of Alabama is authorized to serve a citation for delinquent license; (b) That the officer serving such citation is entitled to the fee of \$1.50 prescribed by law for such services; (c) That any State Highway Patrol officer may serve such citations, but he is not entitled to receive the fee which is collected; (d) That it is the duty of the Probate Judge, or other collecting agency, to pay to the Highway Patrol Fund the citation fee due the State Patrol officer; (e) That the License Inspector, if he is not on a salary, is entitled to receive the fee of fifteen per cent paid by a delinquent who has been served with a citation by a lawful officer other than the License Inspector.

In support of the conclusion which I have reached I invite your attention to certain provisions of law which I quote as follows: "All citations to delinquents shall be served by **any lawful officer**, or by the License Inspector, or his Deputy, who shall be allowed a fee of \$1.50 for each citation served to be taxed against the delinquent." Section 353 (on page 560) Article 14, House Bill 324, 1935 Acts of Alabama, approved July 10, 1935.

"No State Highway Patrol officer shall be entitled to any costs for attending any courts, but instead, the proper authority shall collect such fees and mileage that are due such officers for attendance on any court or for any official act, and to promptly turn same into the Highway Patrol Fund, and it shall become a part thereof, such fees and mileage to be expended as other moneys in said fund are authorized to be expended." Section 11, (page 756) of an Act Number 331 H. 545, 1935 Acts of Alabama, approved Sept. 2, 1935. "That all laws or parts of laws in conflict herewith be and the same are hereby repealed." Section 12 (page 756) of an Act No. 331, H. 545, approved Sept. 2, 1935, 1935 Acts of Alabama. The provisions of law first quoted above authorize citation to be served by any lawful officer and allows a fee of \$1.50 to be paid the officer serving the citation. It is apparent that service of citation on a delinquent is not confined to a License Inspector.

The Act establishing the Highway Patrol prescribes a salary to be paid each Patrol officer and directs that the proper authorities shall collect such fees as are due such patrol officer "for any official act," and shall pay the fees into the Highway Patrol Fund. Service of a citation by a Patrol Officer is an official act for which he is entitled to a fee of \$1.50 and which the Probate Judge shall pay over to the Highway Patrol Fund.

It is obvious, in my judgment, that it was the intention of the Legislature of Alabama to exclude any Patrol Officer from participating in any fees and to confine his remuneration for services rendered to the salary fixed by the Act establishing the office. All such fees due any Highway Patrol officer, therefore, should be turned over to the Highway Patrol Fund.

With reference to the penalty of fifteen per cent imposed on all delinquents in the payment of license, this office has previously held that the money so collected should be paid to the License Inspector if he is not on a salary. I refer you to my opinion of November 22, 1935, addressed to Hon. Henry S. Long, President, State Tax Commission, published in the Quarterly Report of the Attorney General, October through December, 1935, page 203 in which I held that the imposition of the penalty was made automatic even though no citation was served and that such fee should be paid the License Inspector. There is no provision of law which diverts the license fee from the License Inspector to any other lawful officer serving citation.

Quarterly Report, Vol. I, page 203.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1937.

Hon. W. Perry Calhoun,
Representative, Houston County,
Dothan, Alabama.

Members of the Legislature are not prohibited by Section 5024, Code of Alabama, 1923, as amended, from entering into a contract of employment with the governing body of a County.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of March 1, 1937, in which you request an opinion of this office asking whether or not you are prohibited from entering into a contract of employment with the Board of Revenue or Court of County Commissioners for professional services because of the fact that you are a Member of the Legislature.

The Court of Appeals of this State in the recent case of Percy M. Pitts v. Chilton County, et al (MS.) held that a Member of the Legislature could not legally contract for services to be performed for the County.

This opinion was rendered, however, prior to the passage and approval of House Bill 300 of the 1936-1937 Extraordinary Session of the Legislature.

The last mentioned Act limited the operation of Section 5024 of the Code of Alabama, as follows:

"But this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the Treasurer in lieu of a County depository from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County."

In view of the above quoted provision, I am of the opinion that you can legally enter into a contract for professional services to be performed for the County even though you are a Member of the Legislature.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Costs in Probate Court — Become due and payable in same manner as in Circuit Court.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Since the passage of the 'Granade Act' the fees of this Court are payable to the State and County. It is therefore necessary that I take such legal steps as I can to collect costs which accrue in this court and if I did not take such action I and my bondsmen would be liable for misfeasance in office.

"The steps allowed me to collect costs are, of course, to issue execution for the collecting of costs, and as I understand the law, executions cannot be issued within ten days of the date the costs become due and payable and must be issued within ninety days from said date.

"I would therefore appreciate your writing me an opinion as to the time in which costs become due and payable in the Probate Court."

Answering your inquiry I call your attention to Section 9600 of the Code of Alabama of 1923 which provides as follows:

"9600. RULES OF EVIDENCE; PLEADING AND PRACTICE.—The provisions of this Code in reference to evidence, pleading and practice, judgments and decrees, in courts of law and equity, so far as the same can be made appropriate and the mode of obtaining evidence by oral examination or by deposition, and of compelling the attendance of witnesses, and of enforcing orders, decrees and judgments, in the absence of express provision to the contrary, are applicable to proceedings in the court of probate."

It is my opinion that this section applies to costs due and payable in the Probate Court as well as to the other matters specifically mentioned. I do not find express provision dealing with the manner and time of issuing execution for costs in the Probate Court. Section 9600, therefore, authorizes the collection of costs in Probate Courts by the same method provided for collecting costs in law and equity cases.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Uniform Firearms Act — no fee provided for the issuance of license.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 5, 1936, which is as follows:

"Please advise if probate judges are entitled to 50c for issuing pistol license under Act No. 82, S. 63, Simpson, 1936 Acts, page 51."

I am of the opinion that your inquiry should be answered in the negative.

The Act to which you refer is known as the "Uniform Firearms Act," Acts 1936, p. 51. There is no provision contained in said Act providing for a fee for the issuance of said license. The general provision providing for a fee to the Probate Judge for issuing license is not here applicable as the act in question is a specific act dealing in full with a specific subject. Special provisions relating to specific subjects control general provisions relating to general subjects, and things specifically treated will be considered as exceptions to general provisions. *Herring v. Griffin* 211 Ala. 225, 100 So. 202.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. T. L. McKee,
Tax Collector, Chilton County,
Clanton, Alabama.

Tax Collector — Liability for loss of public funds through burglary under facts submitted, officer liable for loss.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

You wish me to advise you whether or not you are personally liable for loss of public funds collected by you. You state that the loss occurred under the following circumstances:

"On the 29th day of December, 1936, while my clerk and I were out of our office during the lunch hour some unknown party or parties entered my office and took from the cash drawer \$166.07 in money. My office, as tax collector, is located in the Court House on the ground floor and the money was confined and locked in a steel cash drawer built into the counter and this was the only place provided by the county for the safe keeping of said money until the same was deposited in the bank, and there was no vault or safe provided. At this time I had two clerks and when we left to go to lunch around 12 o'clock the windows of my office were locked and the money was locked in this steel cash drawer and the door to my office was also locked and upon returning to the office around 1 o'clock, we discovered that the office had been entered and the drawer pushed open and was left open and said sum of money was missing. I make deposits in the bank at the close of each day's business."

In response to my request for additional information concerning the loss of these funds, you wrote me again as follows:

"In addition to the information given you on January 13, 1937, I will advise that the tax collector's office is a small room about 12 ft. x 14 ft., with no vault nor safe nor any place where a person could conceal himself and be left in the office. The door was locked, when we left for lunch and was locked when we came back. It showed no sign of being pried open, which convinces me that the door was opened by a pass key.

"My cash drawer was pried open with some hard metal instrument and had the marks left on it which were bright and the drawer was bent out of shape and left open.

"There are two windows in the office, which were locked when we left the office and were locked when we came back.

"I have never loaned my keys to anyone and there is no other key, to my knowledge, to the door of the cash drawer.

"Immediately upon returning to the office, discovering it had been robbed, I notified the sheriff, deputies and police department.

"The money that was stolen from this office belonged to the State of Alabama and Chilton County, and was collected in the morning of the day on which it was stolen.

"The banks here close at noon for one hour, but we have made arrangements with the bank to make our deposit at 5:00 P. M., to take care of the money we collect between 3:00 P. M., the hour the bank closes, and 5:00 P. M., the hour the office closes."

The facts and circumstances in each case determine liability of a Tax Collector for loss of public funds through burglary or robbery. It is my opinion that the facts set forth in your communication do not exonerate you from liability for the loss of the funds which you mention.

I quote from a recent opinion of this office, dated January 7, 1937, to Hon. Frank O. Deese, Judge of Probate, Ozark, Alabama, as follows:

"If, however, in the discharge of your official duties and in your official capacity as Judge of Probate, you exercise the highest degree of care, diligence, and vigilance to prevent loss and you are robbed of public monies by an irresistible force which you could not have foreseen and guarded against, this would constitute a good defense to an action on your official bond; but if the money of which you were robbed was not the same money which you had collected or if you have committed an official default by failure to pay the money into the treasury as the law requires, such robbery would be no defense."

Reference is made to the case of the *State of Alabama v. Houston*, 78 Ala. 576, which decided the liability of the Tax Collector for loss of funds through robbery. I quote from page 585 of this decision:

"From the course and character of the legislation, on principles of public policy, the only reasonable inference is, that it was the intention to exact of officers charged with collecting, and paying over public revenue, the highest care, vigilance and diligence known, to the law, such as a very prudent and cautious man exercises in respect to the most important matters. Our conclusion is, that while the official bond does not impose absolute and unconditional liability, the statutory provisions, and consideration of public policy enlarge the degree of responsibility beyond that of a mere bailee for hire; and if, having observed the highest care, vigilance, and diligence to prevent loss, the Collector is robbed of money belonging to the State by irresistible force, it constitutes a valid defense to an action on his bond for the recovery of such money."

The question presented for my determination is whether or not you observed the highest care, vigilance and diligence to prevent the loss. I am compelled to state that my conclusion is to the contrary. The cash drawer in which you left the money at noon seems to me was a very flimsy affair if it could be pried open with some instrument. You might reasonably have anticipated that someone could obtain a pass key to fit the door or that someone could have adjusted the lock on the door to prevent it locking when the door was slammed at noon, if such was the case. The money you left in the cash drawer was not a very large amount but I am quite sure that if the sum had been much larger you would not have taken the risk of leaving it in a flimsy cash drawer which seems to be the case in this instance. You probably would have been more cautious and would have left somebody there at noon or you would have taken the money to the bank a little while before 12 o'clock and there deposited it in your usual manner of caring for public funds. The fact that the sum was small did not lessen the degree of care, vigilance and diligence required of you by law in protecting these funds. Since the sum was small, one detail of vigilance and diligence that you could have observed was to have taken the money with you when you went to lunch. There are many different details of caution, diligence and prudence which you could have observed in protecting these funds and which would have exempted you from liability therefor. Since you chose to run the risk of leaving the funds in a small steel cash drawer inside of your office which was locked, I cannot see as a matter of law, or as a matter of fact, that you observed the highest degree of care, vigilance and diligence which the law, as set forth in the case of the State v. Houston, supra, requires of you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. H. W. Clayton,
Clerk, Circuit Court,
Guntersville, Alabama.

The lien which the State of Alabama has under Section 2603 of the 1923 Code of Alabama, on the property of the Clerk of the Circuit Court is discharged at the end of one year after expiration of the term of office of the Clerk, provided there is no unsatisfied judgment against his bond and no suit pending thereon.

The present Clerk of the Court who holds, under garnishment, funds belonging to the former Clerk whose office has expired more than one year is not liable to the State of Alabama for the garnished funds.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of November 10, 1936, which states as follows:

"On November 6, 1928, one Woodie Lewis was elected clerk of the Circuit Court of Marshall County. He executed his bond, conditioned as required by law in the sum of \$10,000 with the Union Indemnity Company as his surety. He executed another bond for \$1,000 as ex-officio clerk of the county court. In February, 1932, he resigned.

"On January 11, 1932 an audit was made by the Comptroller's office. He was found or reported to be short in his accounts at that time on both bonds. Suits were filed at that time or shortly thereafter against him and his surety on both bonds. Judgments were obtained against him and his surety on both bonds. The sum total of all judgments obtained on his county court bond exceeded the \$1,000 liability. The surety paid the \$1,000 and costs in release of these judgments on the county court bond. It also paid the judgments on the \$10,000 bond. Several hundred dollars were collected from Lewis in addition to this for Marshall County on fines and county court cost before the judgments were taken.

"On August 5, 1932 some six months after Lewis resigned, The Maryland Casualty Company et als, who were the owners and transferees of the ex-clerk's cost belonging to the former ex-clerk, H. J. Miller, filed suit in the Circuit Court against Lewis and his surety on the \$10,000 bond, claiming \$780.00 for monies collected by Lewis belonging to them as transferees of Miller, received by Lewis in his official capacity and not accounted for.

"Lewis, in the meantime, transferred by an instrument in writing to his surety, The Union Indemnity Company, all of his uncollected costs in the Circuit Court, and in the county Court. Following this I collected for The Union Indemnity Company of the costs formerly belonging to Lewis, \$265.40. The Maryland Casualty Company et als obtained and had served on me a writ of garnishment in the suit that had been brought against Lewis and his surety, The Union Indemnity Company. Following this, The Union Indemnity Company went into the hands of a receiver. I understand it has other property transferred to it by Lewis that is yet in the State of Alabama. On October 21, 1936, judgment was rendered against Lewis and his surety, and the funds garnished of \$265.40, which I admitted under answer as garnishee, as being indebted to defendant, was ordered by me paid to plaintiff and judgment rendered against me therefor.

"It now appears that possibly Lewis is yet short on some costs collected that has just recently been discovered, that is due the State and County. The surety on his \$10,000 bond on the last audit made on January 11,

1932, paid to the State the amount shown by that audit to be due the State. Auditors are here now, and have instructed me not to pay this judgment off until I get an opinion from you.

"I would call your attention to Section No. 2603 of the Code, which creates a 'lien upon the property of the principal from the date of its execution; but such lien is discharged at the end of one year after the expiration of the term of office of the principal, if no unsatisfied judgment exists against said bond, and no suit is pending thereon.' This is the only lien created by statute as I find on official bonds. This section is, of course strictly construed. The term of office of Mr. Lewis expired in January, 1935. More than one year has expired since that date. Please tell me:

"First: Has the State of Alabama, or any other persons, who had no suit pending, a lien on these funds after January, 1936, one year from the date of the expiration of the term of office of Mr. Lewis?

"Second: Will I be protected in making payment of the judgment obtained against me as garnishee, as against any other person or the State of Alabama, who may hold a claim against Mr. Lewis, the judgment against me having been made final?

"Third: At the end of one year after the expiration of the term of office of Mr. Lewis, were all liens discharged on his official bond except such liens that might be kept alive by having a suit in their favor at the time pending?"

It is my opinion that any item existing in favor of the State of Alabama, or any other person, was discharged at the end of one year from the expiration of Lewis' term of office, provided there was no unsatisfied judgment and no suit pending on the bond in favor of the former lien holder.

I direct your attention to Section 1491 of the 1907 Code of Alabama which reads as follows:

"The bond of the judge of the probate court or the county clerk, or the sheriff, or the clerk or the city or circuit court, or the tax assessor, or the tax collector, and of the county treasurer, is a lien upon the property of the principal from the date of its execution."

The above section again appears in Section 2603 of the 1923 Code of Alabama, but there has been an addition which reads as follows:

" * * * but said lien is discharged at the end of one year after expiration of the term of office of the principal if no unsatisfied judgment exists against said bond, and no suit is pending thereon."

The Legislature of Alabama, I presume, wanted to provide a time when this lien on the property of the principal would expire. I presume that provision for expiration was made by this amendment due to the fact that the Legislature thought it would be unjust and unfair to the principal of the bond to continue the existence of a lien on the property of the principal for an indefinite period of time and thereby restrict the sale or other

disposition of the property pending an audit by the State or until all questions of official liability had been definitely determined. It was, therefore, probably the intention of the Legislature to limit the existence of the lien in order that the principal may at a definite period, be free to sell or otherwise dispose of his property if he saw proper. I refer you to the case of Roebuck vs. Roberts, 117 So. Reporter, p. 32, in which the Supreme Court intimates that it has reached the same conclusion.

So far as the State of Alabama is concerned, or so far as any other person holding a lien upon the funds which you have in your possession as garnishee, I do not think that they have any lien or claim thereto under the facts set forth in your letter. You probably would be safer in paying the money to the judgment creditor.

It is my opinion that all liens upon the property of the ex-clerk Lewis have expired, provided there is no unsatisfied judgment against his bond and no suit pending thereon.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Wm. A. Conrad,
Deputy Clerk, Circuit Court:
Mobile, Alabama

All solicitor's fees earned by a solicitor on salary in misdemeanor cases in the County Court, Inferior Court or other court of like jurisdiction go to the County Treasurer, all fees earned in the Circuit Court including misdemeanors go to the State Treasurer except salaries, commissions which go to the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 5, 1936, in which you request my opinion as follows:

"I have received returns on executions from the Sheriff in about 12 cases on final forfeitures of bonds. In said returns together with the amount of the judgment and costs the sheriff paid to me the Solicitor's Commission of 5% on the amount of the judgment in each case. The final forfeitures in these cases were rendered prior to (Extraordinary Session 1936) March 26th, 1936, the date of the approval of (H. 110-DeVane) No. 54 which Act provided for only one Solicitor's Fee.

"I am aware of the fact that before the approval of the above said Act the Solicitor's fee should be paid to the State Treasurer.

"The points I am worried about are the following and for which I respectfully request your Honor's opinion:—

"1. Is there a difference or distinction between fees and commissions?

"2. Should I pay said Solicitor's Commission to the State Treasurer or to the County Treasurer?"

Answering your request, presuming you have reference to fees of solicitors arising under Section 3738, Code of Alabama, 1923, and commissions of solicitors arising under same section where it said:

"On all forfeitures collected by the Clerk or Sheriff, 5% thereof."

We will discuss these in the order in which they come. Solicitor's fees either go to the State or County Treasurer depending on where the conviction is had. If had in the County Court, Inferior Court or other court of like jurisdiction, then such fees go to the County Treasurer under an Act approved March 26, 1936, General Acts, Extra Session, 1936, page 30, which is as follows:

"That Section 3759 of the Code of Alabama of 1923, be amended so as to read as follows: Section 3759; For every conviction for a misdemeanor in the County Courts or Inferior Courts there shall be taxed and collected as a part of the costs and paid into the County Treasury the same Solicitor's fees provided for conviction in such cases in the Circuit Court, provided that in the event of an appeal to the Circuit Court no Solicitor's fees shall be taxed or collected for the services of a Solicitor in the Circuit Court."

If, however, a conviction for a misdemeanor is had in the Circuit Court this fee must go to the State Treasury, under Section 5511, Code of Alabama of 1923, which is as follows:

"5511. FEES OF SALARIED SOLICITORS PAID INTO STATE TREASURY.—All fees which may be by law taxed as solicitor's fees against defendants on convictions secured by a solicitor who is paid a salary by the state, belong to the state, and, when collected, must be paid into the state treasury."

The above, I think, disposes of solicitor's fees. This brings us to the discussion of commissions earned by the solicitor in fine and forfeiture matters under Section 3738 quoted above. In this connection, I call your attention to Section 5515, Code of Alabama of 1923, which is as follows:

"5515. COMMISSIONS ON FINES AND FORFEITURES TO BE PAID INTO COUNTY TREASURY.—The five per cent commissions which such salaried solicitors are entitled to receive on fines and forfeitures must, when collected, be paid into the county treasury to the credit of the fine and forfeiture fund."

I think from the above quoted section provides that all such commissions go to the County treasurer whether from the County Court, Inferior

Court or other court of like jurisdiction or the Circuit Court. The fine and forfeiture fund is purely a creature of the county and is supported as its name indicates by fine and forfeitures and the State in no manner participates in any part of this fund. I have not confined my answer to your question as suggested in your request but have answered them as a whole, placing both your questions under one general head.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. L. J. Lewis,
Member Jury Board ,
Russell County,
Seale, Alabama.

Term of Jury Commissioner, Russell County, ends under Section 280, Article XVII of the Constitution, when the incumbent assumed office on January 18th, 1936, as member of County Commission of Russell County, Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of December 8th, 1936, as follows:

"I am at the present time a member of the Jury Board of Russell County.

"I have been elected as member of the County Commission of Russell County and under the law creating the County Commission of Russell County my term on said Commission will begin on January 18th, 1937.

"Please advise me whether my term as Jury Commissioner will end when I qualify as Commissioner or will continue until January 18th, 1937, when I begin serving on the Commission."

It is my opinion that you vacate your office as Jury Commissioner when you actually assume your duties as County Commissioner on the 18th day of January, 1937. The Constitution, Section 280, and sub-section 7, section 2575 of the 1923 Code of Alabama, both forbid you holding two offices of profit at one and the same time.

It is my opinion that you do not begin "holding office" until you have actually assumed the occupancy and duties of the office. In the case of *Shepherd vs. Sartain*, 64 Southern Reporter, page 57, Mr. Justice Somerville, as reported on page 61, last paragraph, said: ".....that is, the oc-

cupation—of two offices at the same time that offends public policy, and is therefore forbidden by law.” Further judicial determination by Mr. Justice Somerville is reported at the bottom of page 62, *Shepherd vs. Sartain*, supra, as follows: “Conceding the validity of these propositions, the conclusion stated does not follow ‘Holding office’ within the inhibition under consideration, means qualifying and thereby entering into the office and assuming its obligations and becoming invested with its powers.”

The evil sought to be forbidden by the prohibition against holding two or more offices of profit at one and the same time is the holding of more than one office under the state for which the occupant draws pay. You will not begin drawing your pay as Commissioner of your County until you actually assume the duties of the office on the 18th day of January, 1937, at which time you will immediately vacate your office as a member of the Jury Board of Russell County for the reason that the two offices are incompatible and are offices of profit within the meaning of the constitution inhibition—Section 280 of the Constitution.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. M. W. Forman,
Judge of Probate,
Ashville, Alabama.

County not required to pay feed bill of escaped prisoner for which they would not have been chargeable had the prisoner not escaped.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 8, 1937, in which you request my opinion as follows:

“Please advise if the county can legally pay a feed bill for prisoners who have escaped from the county jail, before said prisoners have been indicted by the grand jury or tried in any court.”

My answer to the above is in the negative. I am aware that Section 3750 of the Code of Alabama, 1923, provides among other things as follows:

“No sheriff must be paid out of the state treasury any fee or allowance whatever, on account of any prisoner who has escaped from his custody; but the commissioners’ court may, in their discretion, pay such fees and allowances as are payable by the county, notwithstanding the escape of the prisoner, if satisfied that such escape was not caused by the connivance or negligence of the officer having charge of him.”

You will note the above says "but the commissioners' court may, at their discretion, pay such fees and allowances as are payable by the county." Note the words "payable by the county." This simply means such fees as were chargeable to the county in the first place and would have been a charge against the county had the prisoner not escaped, and could not mean or be interpreted to mean feed bills for which the State was liable if the defendant had not escaped.

Quarterly Report of the Attorney General, Volume II, page 291.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. G. H. Boyd,
Register in Chancery,
Birmingham, Alabama.

Register in Chancery required to pay over fiduciary funds to County Treasurer as required by Section 10465 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of December 8, 1936, from which I quote as follows:

"I would appreciate an official opinion on Section 7244 of the 1923 Code of the State of Alabama; that is, whether or not the section applies to Registers in Chancery as well as Clerks of Courts of Record.

"In the event this section does not apply to Registers in Chancery would I pay uncalled for witness fees into the County Treasury under Section 10465 of the 1923 Code of the State of Alabama?"

It is my opinion that your disposition of fiduciary funds as defined by Section 10459 of the 1923 Code of Alabama is governed by Section 10465 of the 1923 Code of Alabama. I do not think that Section 7244 of the 1923 Code of Alabama applies to a Register in Chancery, but that the official conduct of the Register in Chancery with reference to disposition of fiduciary funds is intended to be governed and controlled by said Section 10465. Section 10459 of the 1923 Code of Alabama specifically includes Registers as well as other officials, while Section 7244, supra, makes no mention of Registers and only specifically names Clerks. The Register is not a Clerk in the sense of Section 7244, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Filing tax — Filing tax on long term lease dependent upon the cash value at the date of making such lease of the interest conveyed. Recorded mortgage on property not deductible although taken into consideration in arriving at cash value of interest conveyed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date which is as follows:

"Please advise if, under Schedule 46 of the Revenue Law of Alabama of 1935, when a long term lease is offered for record, the value of any record mortgages existing on the property involved in the lease, should be deducted from the value of the lease, as determined by the Judge of Probate.

"We have not been deducting the amount of recorded mortgages from the value of the lease, and this question has been raised recently."

In answer to your inquiry, I am of the opinion that the recorded mortgages existing on property involved on long term lease are not deductible from value of the lease, although same should be taken into consideration in arriving at the cash value of the interest conveyed by such lease.

In discussing the filing tax due on long term lease in an opinion rendered to you under date of June 7, 1934, (Biennial Report Attorney General, 1932-1934, p. 568) the following is stated:

"In an opinion appearing in the Biennial Report of the Attorney General, 1926-1928, page 183, it was held that a long term lease conveyed an interest in real estate, and was subject to the filing tax dependent 'upon the cash value at the date of making such lease of the interest conveyed.' In an opinion appearing in Biennial Report 1928-30, page 538, the method of determining such present cash value was discussed and the table set out in *Reiter Connolly Mfg. Co. v. Hamlin* as Admr., 144 Ala. 220, was suggested, as a practical method of arriving at a fair result.

"The statute makes the tax payable on the value of the property conveyed. The determination of the value is necessarily a judicial question to be determined by the Judge of Probate in a judicial capacity. In the absence of fraud or palpable mistake, I assume his find of fact is conclusive.

"Applying the foregoing principles I suggest that you estimate or ascertain as best you can the total probable monthly rental and apply same method similar to the table suggested in the Hamlin case, to determine the present cash value of the interest conveyed, giving consideration to any special facts appearing in any particular case.

"The last paragraph is suggested as an aid to you. The Judge of Probate is the officer charged by law with the judicial ascertainment of the value of the property conveyed."

The amount of the recorded mortgage on the property in question, in my opinion is not deductible from the amount of the value determined by the Probate Judge. However, in arriving at this value the Probate Judge should take into consideration the amount of the mortgage on the property. This is not like a deed which conveys property on which there is a mortgage. In that instance the actual value of the property is determined and the amount of the mortgage deducted. In the instance of long term leases the actual value of the property is not taken into consideration. The amount of filing tax due is dependent "Upon the cash value at the date of making such lease of the interest conveyed."—Biennial Report of Attorney General 1932-1934, page 568, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. Ex-service men entitled to exemption in amount allowed by law on flying jenny license.

2. A deed given in lieu of foreclosure is subject to deed tax.

Opinion by Assistant Attorney General Knabe.

Dear Mr. Lee:

I have your letter in which you request my opinion as follows:

"1. Is an ex-service man entitled to an exemption for a license used for the purpose of operating a flying jenny under Section 64, page 207 of the 1935 Revenue Act and under Schedule 72, page 259 of the Revenue Code of 1929?

"2. A deed in lieu of foreclosure was given to a mortgagee, said deed providing that it was given for the purpose of saving the expense of foreclosure under power in the mortgage. No new considera-

tion was given for the conveyance, the entire purpose being to cut off the equity of redemption and secure the statutory right of redemption of two years, same as if the mortgage had been foreclosed under the power in the mortgage. Does this sort of deed require a deed or mortgage tax?"

Replying to your first inquiry, I am of the opinion that veterans who meet all requirements of the Veterans Exemption Act (Acts 1935, page 1057) would be exempt from part of the license provided for the operation of a flying jenny prescribed by Sec. 64, page 207 of the 1935 Revenue Act. Prior to the enactment of the 1935 Veterans Exemption Act, veterans would be exempt under the provisions of the 1931 veterans acts.

In answer to your second inquiry, this department has previously ruled that a deed given in lieu of foreclosure is subject to a deed tax. See 1930-32 Biennial Report of Attorney General on pages 656 and 1024.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. S. G. Johnson,
Probate Judge,
Lamar County,
Vernon, Alabama.

Newstands from which magazines and/or periodicals are sold subject to license imposed by Schedule 99, Acts of 1935, page 483.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Schedule 99 has, up to last year, been construed so that unless newspapers and magazines, both, were carried, that there was no newstand, and no license.

"Now they claim that only magazines for sale should be construed as a newstand, and that with only magazines, they should be due and pay a license.

"Will you please advise me in this premise at once."

It is my opinion that a newstand from which magazines and/or periodicals are sold is subject to the privilege license imposed by Schedule 99, Acts of 1935, page 483.

The revenue laws of Alabama as compiled in 1929, Schedule 128, page 290, read as follows: "For each person operating a newstand for the sale of newspapers, magazines, and periodicals, \$5.00" (Acts of 1919, p. 282, Section 361, Schedule 75). The Acts of 1935 made a change in the license schedule covering newstands. The 1935 Acts, Schedule 99, provides as follows: "For each person operating a newstand for the sale of magazines and/or periodicals, \$5.00."

It is to be observed that the Schedule in the Acts of 1935 does not mention newspapers. It is further to be observed that the sale of magazines and/or periodicals is all that is necessary to come within the provisions of the schedule for 1935. The sale of magazines and periodicals, either or both, is sufficient to invite the imposition of a license for the operation of a newstand.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

License — Auctioneers. Persons actually selling at public outcry is party required by Schedule 11 of the 1935 Revenue Act to take out license as auctioneer.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I wish to acknowledge receipt of your letter of February 27, 1937, which reads as follows:

"A firm here is operating an auctioneer business, selling all kinds of livestock for the public and charging a small commission for the service. One person has done all the auctioneering for this firm but he is not a regular auctioneer but an employee of one of the members of the firm. They think that they may want to change auctioneers but do not want to place themselves in position to have more than one auctioneer's license.

"Will you please refer to schedule eleven of the Revenue Laws of 1935 and advise whether Probate Judges may issue a license as auctioneers to a firm and whether the firm may change the personnel of the selling end from time to time without taking out an additional license. In other words, when the license as auctioneer is taken out, does

such a license permit a firm to do an auctioneer business or is the license just for the particular person doing the selling at the auction sale?"

I am of the opinion that a license to engage in the business of an auctioneer is a personal one and that every person who actually performs the duties of an auctioneer is required to obtain a license. I do not think that a firm can take out a license as an auctioneer and have any number of agents engaging in the said business with only one license.

I refer you to an opinion rendered on November 30, 1935, to the Probate Judge of Clay County, which opinion is reported in Quarterly Report of the Attorney General, Volume I, page 260. This opinion deals with the very question at hand.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. E. H. Hall,
Clerk of Circuit Court,
Henry County,
Abbeville, Alabama.

The claims of officers against the Fine and Forfeiture Fund of a county cannot be made a preferred claim under Section 231, Code of Alabama 1923, as amended by an act approved June 6, 1935 (General Acts 1935, page 162).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 11, 1936, in which you request my opinion as follows:

"No 110, page 162, General Acts, Regular session 1935. 'To amend Sec. 231 of the Code of Alabama of 1923 listed as preferred claims, items listed in Class 2; compensation of Clerk of the Circuit Court, would under this class/Fine and Forfeiture Claims of a local act' approved August 22, 1919, (Acts 1919, Local pages 72-73) amended in 1927, (Local Acts page 166) be listed as part of my compensation?"

The act to which you refer, that is, the act approved August 13, 1927 (Local Acts 1927, page 166) does not amend Local Act 1919, page 72, but amends Local Acts 1919, page 66, but let this be as it may, I fail to see where these acts, one way or the other could affect the matter you refer to here. You call attention to act of the legislature approved July 6, 1935 (General Acts 1935, page 162) which amends Section 231, Code of Alabama of 1923, which section has to do with preferred claims and the order of payment

against the general fund of the county. You desire to know if your claims which are payable out of Fine and Forfeiture Fund of the County could be paid under sub-section 2 of this act which has to do with preferred claims of the second class. My answer is in the negative. Section 231, as amended, supra, has to do with claims which are paid out of the general fund of the county and has nothing to do with claims paid out of Fine and Forfeiture Fund of the County. The Fine and Forfeiture Fund of a county is an independent fund created not by taxation but derived from fines and forfeitures imposed in the county. **Quarterly Report of Attorney General, Vol. II, page 62.** Therefore, any claims that you may have against the Fine and Forfeiture Fund of your county does not come under any provision of Section 231, Code of Alabama of 1923, as amended by the Act of 1927, page 162.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. L. W. Price,
Judge of Probate, Conecuh County,
Evergreen, Alabama.

Officer issuing fishing license entitled to fee of 15c per license in accordance with provisions of Section 42, and subject to the exceptions therein provided.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of March 4, 1937, as follows:

"Please refer to Legislative Act 147, House Bill 272, relating to the catching or killing of fish by reel and rod and requiring the procuring of a license for same, and advise if the issuing officer is entitled to any fee or compensation for issuing the license, and, if so, how much?

I am of the opinion that a designated officer who issues a fishing license is entitled to a fee of 15c for each license issued, subject to the exceptions and provisions of Section 42 of an Act approved August 12, 1935.

The Fishing License Act (Governor's No. 147, approved February 27, 1937) provides that the fishing license "shall be procured in the same manner as is provided in procuring a hunting license and under the same regulations provided therefor." The regulations for issuing licenses are set forth in an Act approved August 12, 1935 and Section 42 of that Act prescribes a fee of 15c per license. This section is an integral part of the "regulations" provided for issuing hunting licenses. Further, it was not the intent of the Legislature to pay 15c for issuing a hunting license and pay nothing for the same service in issuing a fishing license.

I am therefore of the opinion that a fee of 15c per license should be paid in accordance with Section 42, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. J. R. White,
Chairman, Board of Revenue,
Walker County,
Jasper, Alabama.

Counties — Where debts outstanding as of October 1, 1935 were paid in part by temporary loan and the balance by funds drawn from the County general fund, refunding warrants may now be issued under provisions of an Act approved April 21, 1936, (General Acts of 1936, page 217, companion law to County Financial Control Act), to refund only the temporary loan.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of inquiry as follows:

"I would like to have your opinion as to whether or not Walker County may issue and sell interest bearing warrants under any provisions of the County Financial Control Act under the following circumstances and for the following purposes:

"On October 1, 1935, there were outstanding obligations against the general fund of the county of \$29,892.88. This was made up of various accounts payable in the sum of \$24,142.88, and of amounts pledged and due by the County to the Walker County Library Board in the sum of \$5,750.00. Twelve Thousand (\$12,000.00) Dollars of these accounts was paid by the County Board borrowing that sum of money from a local bank and issuing interest bearing warrants. The balance of these accounts and the amount due to the Walker County Library Board were paid out of the general fund of the County.

"It has now developed that the county exhausted too much of its funds in paying these obligations and that instead of paying them the county should have issued interest bearing warrants. Unless long term interest bearing warrants can now be issued to replace the money that was used in the payment of the accounts and obligations described above, then the county will be seriously handicapped in working out its budget for the coming year and will, in all probability, be unable to meet some of its obligations for the necessary current governmental operating expenses.

"I would like to be advised as to whether or not Walker County may issue interest bearing warrants running over a period of twenty years if deemed advisable in the sum of approximately \$29,882.88, and sell the same, the proceeds thereof to be placed in the general fund of the county to retire the \$12,000.00 short term warrant and to take the place of the money that was used to pay the obligations of the county mentioned above."

It is my opinion that you are authorized by an Act approved April 21, 1936, No. 181 (General Acts of 1936, page 217), to issue refunding warrants in the sum of \$12,000.00, the proceeds of which are to be used in paying

the temporary loan of \$12,000.00 made by your County to liquidate a portion of a debt existing on October 1, 1935, as stated in your request.

This conclusion harmonizes with an opinion rendered by this office on July 7, 1936, to you (Volume IV, Quarterly Report of the Attorney General, page 12), and with an opinion rendered to the Judge of Probate of Hale County on February 8, 1936 (Quarterly Report of the Attorney General, Volume II, page 138), in which it was held "The fact that a temporary loan has been secured to take care of this (an) obligation merely changes the form of the obligation and does not prevent it being a general obligation." Instead of issuing refunding warrants you elected to procure a temporary loan. The effect of your election was only to change the form of the obligation.

With reference to the balance of the debt which you say was paid from the general fund of your County, it is my opinion that you are not authorized under this Act to issue refunding warrants to take the place of money you used in discharging the debt. This debt no longer exists in any form, but has been paid and discharged. It is true the money to pay off the debt was obtained from the general fund of your County and that your election to pay the debt in the manner you state will lead to some embarrassment, but regardless of this situation there is no way to escape the conclusion that the debt has been paid and no longer exists in the old or in the changed form. Your County cannot, of course, owe a debt to itself.

The Emergency provisions of the County Financial Control Act (General Acts of 1935, page 803) has no application to the instant inquiry, because, in my opinion, it deals only with situations over which the County governing body has no control. The facts as stated in your letter do not present an emergency contemplated by this Act, nor does this Act under any phase, authorize refunding warrants for the balance paid from the general funds of the County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1937.

Hon. N. P. Tompkins,
Judge of Probate Court,
Colbert County,
Tuscumbia, Alabama.

Application to redeem land on installment plan and without interest or penalties as provided by Section 291, as amended, of an Act "An Act to provide for the general revenue of the State of Alabama," approved March 26, 1936, page 207, should be filed with the Probate Judge before January 1, 1937. Probate Judge should not accept application after December 31, 1936, for redemption on the installment plan.

Under Section 291 of Act Number 194, 1935 Acts as amended by Act Number 49, 1936 Acts, page 49, Probate Judge may accept appli-

cation on and after January 1, 1937 for redemption of land sold to the State, but the redemption shall be governed by Section 268-290, Revenue Act, 1935.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of the 10th, from which I quote as follows:

"General Acts of 1935, page 377, Section 291, as amended by General Acts of 1936 pages 27 and 28, provide that persons desiring to redeem under provisions of the four year law, shall before January 1, 1937, make application to redeem, etc.

"Please advise if above provision means that persons having four years to redeem under above act, cannot redeem unless application to redeem is filed prior to January 1, 1937, and should I as Probate Judge permit redemption by such persons if they fail to file application to redeem prior to January 1, 1937."

It is my opinion that application to redeem land on the four-year installment plan and without interest or penalties as authorized by an Act to amend Section 291 of an Act entitled "An Act to provide for the General Revenue of the State of Alabama," approved March 26, 1936, appearing on page 27 of the 1936 Acts of Alabama, should be filed with the Probate Judge before January 1, 1937. It is further my opinion that the Probate Judge should not accept the application if filed later than December 31, 1936, nor should he permit redemption of the land on the installment plan as provided by said Act.

It is further my opinion that applications filed after December 31, 1936 should be governed by the rules and regulations for redemption which are provided for under the provisions of Sections 268-290 of the Revenue Act of 1935.

The Act referred to in the preceding paragraph makes the following provision: "Whenever any real estate has, prior to January 1, 1931, been sold for taxes and bid in by the State at tax sale, **the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions may apply.**"

The Act then proceeds with the additional provisions which I quote as follows:

"All persons having the right to redeem, shall have four years from the date of sale to redeem and such redemption shall be made as in other cases except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties. Any person having the right to redeem any property sold to the State for taxes and who desire to redeem under the provisions hereof, shall, before January 1, 1937, make applications to the Probate Judge of the County where the real estate is situated, the same to be approved by the State Land Commissioner, and shall deposit with the Probate Judge a sum

equal to not less than one-fourth of accrued taxes, without interest or penalties, and annually thereafter shall pay not less than one-fourth of said sum to the Probate Judge."

It is apparent that it was the intention and purpose of the Legislature to offer bargain days for the redemption of lands sold to the State prior to January 1, 1935 and the bargains to be offered on those days was redemption on an installment plan without penalty or interest. It is further evident that it was the intention of the Legislature to set and fix a time limit when these bargains should expire, and that it fixed the time limit as December 31, 1936, after which time the Probate Judge is not authorized to receive applications for installment redemption. The Legislature specifically stated that all real estate sold to the State prior to January 1, 1935, should be redeemed in the same manner as provided for sales after January 1, 1935, unless an application to redeem on the installment plan and as authorized by the Act, is filed with the Probate Judge is not barred after January 1, 1937, from accepting applications for redemption of lands sold to the State in the manner provided for redemption from sales made after January 1, 1935, but he is prohibited from accepting applications to redeem on the installment plan without interest or penalties.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Costs — Justice of the Peace — Not entitled to continuance fee on warrant of arrest returnable instanter.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

You request an opinion on a state of facts as follows:

"An opinion from your office is respectfully requested regarding continuance fee taxed by a certain Justice of the Peace in Shelby County in all cases for which he issues the warrant, in other words, this Justice of the Peace issues warrant returnable instanter at his office. When defendant is apprehended he appears before Justice of the peace and the Justice of the Peace sets date of trial. For this procedure the Justice of the Peace claims one continuance fee, twenty-five cents."

It is my opinion that a Justice of the Peace who issues a warrant returnable instanter and upon appearance of the defendant thereupon continues the case to a day certain is not entitled to a fee for a continuance.

Under such a state of facts, there was no continuance of a case which had been set down for trial, but merely the fixation of a date for trial. A continuance fee under the law is allowed only for the continuance of the trial and not for the fixation of a day certain for trial.

If at the time the prisoner is brought before the Justice of the Peace, witnesses have been summoned and other preliminaries necessary for trial have been made, and it then develops that the cause cannot be tried on that particular day, the Justice of the Peace would be entitled to the fee for a continuance. Sec. 3753, Code of Alabama, 1923. Under such circumstances a trial day had actually been fixed. The mere appearance of the defendant before the Justice of the Peace without more and the fixation at that time of a day certain for trial is not such a continuance for which the Justice of the Peace is entitled to pay.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Judge of the County Court who unlawfully suspends sentence to hard labor for fine and costs is not responsible for uncollected costs.

Judge of County Court on entry of nol pros; has no authority to tax costs against the defendant.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Listed on County Court Docket of a certain County is a case of the State vs. Defendant on a charge of abusive language.

"After one continuance, the case was tried on April 1, 1935, and the defendant found guilty and punishment fixed as follows:

"'A fine of \$5.00 and the cost of this proceeding \$21.10 including court cost and officers cost.'

"The cost of the case, including fine as entered on the fee book totals \$36.10 as follows:

Fine	\$ 5.00
Court Fee	5.00
Clerk Fee	4.05
Sheriff Fee	6.00
Solicitor Fee	10.00
Justice	.75
Witnesses	5.30
	\$36.10

"The defendant having failed to pay the fine and cost, he was sentenced to hard labor for 10 days to pay the fine and 41 days for the cost.

"The following order is entered on the docket, signed by the County Court Judge:

"Sentence is hereby suspended and the defendant is placed on probation on good behavior and on his agreement to pay \$1.00 a week until the cost of \$21.10 is paid, the cause is continued."

"It will, therefore, be seen that the Judge of the County Court has waived the fine of \$5.00 and the Solicitor's fee of \$10.00.

"Please refer to an opinion of the Attorney General—1932-34, page 265—and advise:

"1. Has the Judge of the County Court the authority to void the statutory charge of the Solicitor's fee (Sec. 3738 1923 Code) applying in this case?

"2. If the answer to the above is negative, should this amount be charged against the Judge of Probate as ex-officio Judge of the County Court?

"In the above case the defendant has paid to the clerk the sum of \$13.30.

"It is also noted that in numerous instances the County Court Judge has nolle prossed cases on the payment of clerk and sheriff fees only.

"If a nolle pros is entered should any cost be taxed against the defendant?

"If so, should not such cost include court fee and solicitor fee (County Court?)

"If these fees should be included and are omitted who would be responsible for such omission?"

It is my opinion that the judge of a county court is without lawful authority to suspend judgment and sentence of a defendant on a misdemeanor charge. The Act of the Legislature authorizing such suspension was held unconstitutional in the case of *Montgomery v. State*, 163 So., 365.

The act of the Judge in suspending a sentence contrary to law is not such an abuse of an official duty as will impress any liability on his official bond for uncollected costs. The order of suspension is absolutely void.

The judgment of the court against the defendant for payment of the fine and costs is not extinguished nor is it satisfied by suspension of the sentence.

There is no authority of law which permits the judge of a county court to enter nol. pros. in a case on condition that the defendant pays the costs. Any attempt of the court to impress a condition of this nature is absolutely void and without authority. Opinion of the Attorney General, Book IV, page 79.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 17, 1937.

Hon. M. W. Forman,
Judge of Probate,
Ashville, Alabama.

The county is not responsible for the premium on the bond of the chief clerk in the probate office.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 8, 1937, in which you request my opinion as follows:

"Please give me your opinion as to the county paying the premium on the Probate Judge Chief Clerk's bond, when so ordered by the Court of County Commissioners."

My answer to the above is in the negative. The Act of Legislature approved April 20, 1933 (General Acts of Alabama, 1933, page 203), which act has to do with and regulates the making of bonds of county officials and employees, does not make a provision for nor include the Chief Clerk of the Probate Court. So we look next to the statute creating the office of chief clerk of the probate court. I call your attention to Section 9591, Code of Alabama, 1923. This section is dealing with the authority of the Judge of Probate and it says among other things:

"The judge of probate has authority—To employ, at his own expense a chief clerk and such other clerks as he deems necessary, whose official acts he is responsible for."

You will note from the above that the Judge of Probate is held responsible for the official acts of such clerk. I call your attention to Section 9593 of the Code of Alabama, 1923, which is as follows:

"OATH AND BOND OF CHIEF CLERK.—Such chief clerk, before he enters upon his duties, must take the oath directed to be taken by the officers of this state, and give bond with surety, payable to the judge of probate in such sum as he may prescribe, upon which bond such clerk shall be liable to such judge in consequence of any act of misfeasance or malfeasance of such chief clerk in the duties of his office; which bond must be approved by the judge of probate, and filed and recorded in the office of the clerk of the circuit court of the county."

So it is apparent that the bond of the chief clerk in the office of the Judge of Probate is not made for the protection of the county or any of its funds, as the Probate Judge's bond does this, but is made to the Judge of Probate for his protection. Neither the state nor county have any interest in this bond, therefore, the county cannot be made responsible for the premium on such bond.

I am herewith enclosing a copy of an opinion rendered on January 25, 1935 to the Probate Judge of Hale County, wherein the same conclusion is reached.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 19, 1937.

Hon. E. A. Hammett,
Judge of Probate,
Talladega, Alabama.

Tax deed — Probate Judge has no authority to issue tax deed to heirs of purchaser at tax sale, unless the certificate of purchase is surrendered or it is reestablished in the manner provided by law.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of inquiry from which I quote as follows:

"I have had this question arise: Forty acres of land were sold for taxes in the year 1921. The land has never been redeemed. The pur-

chaser at the tax sale died several months ago. His heirs or devisees now ask that I execute to them a tax deed. They do not have the certificate issued by the Tax Collector to the purchaser at the Tax sale.

"As I understand the law, the purchaser is required to surrender the certificate of purchase at the time he requests a deed.

"Please advise me whether I should execute a deed, or what course should be followed by me."

It is my opinion that you are not authorized to execute and deliver a tax deed to the heirs of the purchaser of land at a tax sale, unless the certificate of purchase is surrendered to you. You are authorized to make a deed only upon surrender of the certificate of purchase. Section 241, 1935 Acts of Alabama, page 360, reads as follows:

"After expiration of three years from the date of the sale of any real estate for taxes, the Judge of Probate then in office must execute and deliver to the purchaser, other than the State, or person to whom the certificate of purchase has been assigned **upon return of the certificate** and payment of a fee of \$1.00 to the Judge of Probate, a deed to each lot or parcel of real estate sold to the purchaser, etc."

This statute should be strictly construed. I might state parenthetically that the deed may be delivered at the expiration of two years where the sale was made before April 19, 1933. Quarterly Report, Attorney General, Volume 2, page 107.

I think you should require a surrender of the certificate before making the deed for the reason that you have no definite assurance that the certificate of purchase was not transferred by the original purchaser. If the certificate of purchase has been established in a procedure of Court which would be lawfully binding on you, then in that instance you could probably act, but until proper procedure has been taken, I can only advise you to insist upon surrender of the certificate of purchase before you make a tax deed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 20, 1937.

Mrs. Bessie R. England,
Custodian of Perry County School Funds,
Marion, Alabama.

Education — Custodian of County School Funds is entitled to reasonable pay for services rendered. County Board of Education may pay Custodian out of Minimum Program Fund.

Opinion by Assistant Attorney General Simmons.

Dear Madam:

Reference is made to your letter which I quote as follows:

"Recently the Perry County Board of Education appointed me Custodian of School Funds of Perry County with an increase in salary of \$25.00 per month. Out of what funds is the salary of Custodian of School Funds to be paid. It might be well for you to know that as Assistant to the Superintendent I was being paid the sum of \$70 per month, and upon being appointed Custodian the salary was raised. Now under the new Superintendent's administration, should he see fit to discontinue the service of an office assistant could he pay me for service rendered as Custodian, and if so out of what fund could the salary be paid."

This office has heretofore ruled on October 28, 1936, in an opinion addressed Hon. J. G. Pinson, Rockford, Alabama. (Quarterly Report of the Attorney General, Vol. V. page 63) that the School Depository may be paid out of the Minimum Program Fund for clerical assistance in handling school funds.

Adopting the reasons assigned in that opinion for such payment, it is my opinion that the County Board of Education of your County is authorized to pay you a reasonable salary for the services you have rendered. Your service as Custodian of the School Funds is, in my judgment, an aid in providing a minimum term for schools in your County and also is an assistance in the promotion of equalization of educational opportunity for all children in the schools of your County and comes within the purview of Section 2 of Act No. 295, H. B. 852 approved September 2, 1935 (General Acts of 1935, p. 714).

Yours very truly,
A. A. CARMICHAEL,

Attorney General.

March 20, 1937.

Hon. J. A. Simpson,
State Senator,
Jefferson County,
Birmingham, Alabama.

Licenses — Automobile dealers having licenses under Schedule 12 of Section 348 of Revenue Act of 1935, not exempt from license required by Schedule 147 if engaged in selling automobile accessories and/or parts by truck to other dealers over state.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 30, 1936, which is as follows:

"The Tax Commission is demanding that dealers in Ford parts over the state who are also dealers in Ford cars and products of all kinds and who pay the license provided for in Schedule 12 of the Revenue Act of 1935 (Simon's Code page 222) also pay a transient dealer's license under Schedule 147 of the same Revenue Act (Simon's Code page 290).

As we read and interpret Schedule 12 and as the Supreme Court held against us in the case of **Henry vs. McCormack Motor Car Company**, 167 Sou. 256, we do not believe these dealers are liable for this double tax.

"The Supreme Court said that the words "automobile accessories" didn't mean automobile and accessories but meant only accessories. We must contend that the words have some meaning and the Tax Commission is now contending that they don't mean either automobile or accessories. It would be very much appreciated if you would give us your opinion as to whether or not dealers who send trucks around over the state from which they sell at wholesale automobile parts to other dealers and who pay the license required under Schedule 12 are also liable for licenses required under Schedule 147 and very greatly oblige."

I am of the opinion that your inquiry should be answered in the affirmative.

The question presented by your inquiry is whether or not the exemption provision in Schedule 12 would exempt an automobile dealer from the payment of the license required by Schedule 147, if the concern otherwise is liable for the license as a "transient dealer" under Schedule 147.

The exemption provision in question of Schedule 12 is as follows:

"Provided that upon payment of the license according to the foregoing schedule, a dealer in automobiles may do a general automobile and automotive business and not be required to pay any further or additional state and county licenses to handle or sell automobiles accessories and parts, radios, tires and batteries, or for the operation of a garage for storage where a charge is made, or for the repair of painting of motor vehicle or trucks. * * * *"

In construing the above quoted exemption provision, this office has held that same did not prevent the collection of licenses for each established place of business. **Quarterly Report Vo. 1 p. 26.** Our Supreme Court held that this exemption provision did not exclude the collection of both a State and County License. **Henry v. McCormack Bros. Motor Car Company** 232 Ala. 196, 167 So. 256.

The purpose of the exemption provision in question was to allow an automobile dealer who had taken out a license under Schedule 12 to handle or sell automobile accessories, batteries, tires, etc. at the established place of business to which the license under Schedule 12 was applicable without additional licenses (Schedule 16 for example). It does not, in my opinion, authorize such dealer to do a transient dealer's business by selling the products, even at wholesale, off trucks throughout the state without having licenses for same under Schedule 147.

The purpose of Schedule 147 is to require a license of those businesses therein enumerated doing a transient business regardless of an established place of business. There are certain exemptions contained in said Schedule, but same are not applicable to the instant case. If an automobile dealer is liable for a license for each established place of business, then such dealer would be liable for a transient dealer's license if he comes within the provisions of Schedule 147. Exemptions are strictly construed against the person claiming the exemption.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 23, 1937.

Hon. William O. Baldwin,
Chairman, Alabama Alcoholic
Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. Alcoholic beverages sold by licensed clubs, restaurants and hotels cannot be sold for other than "on-premise consumption."

2. A guest, patron or member of a licensed hotel, restaurant or club cannot carry alcoholic beverages bought from such hotel, restaurant or club off the premises, either sealed or after the same have been opened, since alcoholic beverages so sold are for consumption on the premises only.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 18, 1937, which follows:

"I am writing you at this time to ask that you please interpret for this Board Section 11, Sub-sections a and c, pages 19 and 21 of the Alabama Beverage Control Act. Under Section 11, Sub-section a—Authority To Issue Liquor Licenses to Hotels, Restaurants and Clubs, and Section 11, Sub-Section a, Issuance of Hotel, Restaurant and Club Liquor Licenses, the law specifically states that the Board has authority to issue a liquor license to a hotel, restaurant or club to purchase liquor from State Stores for sale to guests, patrons, or members for consumption on the premises of such hotel, restaurant or club.

"Question 1. Under this Section of the Alabama Beverage Control Act, can any alcoholic beverages be sold by a club, restaurant or hotel for other than on-premise consumption?

"Question 2. Can a guest, patron, or member of a hotel, restaurant or club, purchase alcoholic beverages from said hotel, restaurant or club

in a sealed container and carry same off of the premises, either sealed or after having been opened?

"The law seems to be very clear that alcoholic beverages sold by liquor licensees licensed by the Board must be sold only in sealed containers for on-premise consumption. It is very important that this question be answered by your office before this Board places an order for alcoholic beverages to be sold and distributed to liquor licensees in that if liquor licensees are confined in their sales to consumers for on-premise consumption, we must order miniatures.

"Therefore, I would appreciate an opinion interpreting the hereinabove section of the law immediately."

A full and complete answer to your inquiry will necessitate a consideration of other sections of the Alabama Beverage Control Act as well as Sub-sections (a) and (c) of Section 11 of said Act, the sub-sections mentioned in your letter of inquiry.

The pertinent sections and sub-sections of the Alabama Beverage Control Act will here be set out in the order in which they appear in said Act.

Sub-section (a) of Section 11 reads as follows:

"Authority to Issue Liquor Licenses to Hotels, Restaurants and Clubs—Subject to the provisions of this Act, and regulations promulgated under this Act, the Board, with the approval of the City Commissioners or other governing authority, if the hotel, restaurant or club be located in a municipality or with the approval of the Board of Revenue and Road Commissioners or other governing authority, if the hotel, restaurant or club be located in the county and outside the limits of the municipality, shall have authority to issue a liquor license for any premises kept or operated by a hotel, restaurant or club and specified in the license, entitling the hotel, restaurant or club to purchase from an Alabama Liquor Store and to keep on the premises such liquor and, subject to the provisions of this Act and the regulations made thereunder, **to sell the same and also vinous, malt or brewed beverages to guests, patrons, or members for consumption on the hotel, restaurant or club premises.** Such licensees shall be permitted to sell malt or brewed beverages as defined in this Act and wines of alcoholic content not in excess of twenty-four (24%) per cent by volume, **for consumption on the premises.** Such licenses shall be known as hotel liquor licenses, restaurant liquor licenses, and club liquor licenses, respectively." (Emphasis ours).

Sub-section (c) of Section 11 reads as follows:

"Issuance of Hotel, Restaurant and Club Liquor Licenses. Upon receipt of the application, the proper fees, the certificate of approval of the governing authority, and upon being satisfied of the truth of the statements in the application, and that the applicant is a person of good repute and seeks a license for a hotel, restaurant or club as defined in this Act, the Board shall grant and issue the applicant a liquor license entitling him to purchase liquor from an Alabama Liquor Store, and **in that part of the hotel, restaurant or club, set out in the license, to sell liquors as herein defined in original unbroken packages or containers**

as purchased from Alabama Liquor Stores and also vinous and malt or brewed beverages to the patrons, guests, or members for consumption in that part of the hotel or restaurant habitually used for the serving of meals to patrons, guests or members, or in private rooms of the building, as hereinafter provided, and in accordance with the provisions of this Act and the regulations made thereunder." (Emphasis ours).

Section 16 reads, in part, as follows:

"Sale of Liquor by Licensees:—Every hotel, restaurant or club licensee may sell liquors as herein defined in original unbroken packages or containers as purchased from Alabama Liquor Stores for consumption only in that part of the club, hotel or restaurant habitually used for serving of food to guests or patrons, and, in the case of hotels and clubs, to guests or members in their private rooms in the hotel or club. In the case of a restaurant located in a hotel, which is not operated by the owner of the hotel and which is licensed to sell liquor under this Act, liquor may be sold for consumption in that part of the restaurant habitually used for the serving of meals to patrons, and also to guests in private guest rooms in the hotel." (Emphasis ours).

Section 17 reads as follows:

"Sale of Malt or Brewed Beverages—Every license issued to a hotel, restaurant, club or railroad pullman or steamship company under this Act for the sale of liquor, shall authorize the licensee to sell vinous and malt or brewed beverages at the same places, but subject to the same restrictions and penalties as apply to sales of liquor, except that licensees may sell vinous, malt or brewed beverages, as herein defined, for consumption on the premises where sold in the manner hereinafter set forth. (Emphasis ours).

In view of the plain, clear, and unambiguous wording of the above quoted portions of the Alabama Beverage Control Act, and especially in view of the use of the word "only" in Section 16, supra, I am of the opinion that:

1. Alcoholic beverages sold by licensed clubs, restaurants and hotels cannot be sold for other than "on-premise consumption."
2. A guest, patron or member of a hotel, restaurant or club cannot carry alcoholic beverages bought from such hotel, restaurant or club off the premises, either sealed or after the same have been opened, since alcoholic beverages, so sold, are for consumption on the premises only.

In my opinion, such conclusions are inescapable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 25, 1937.

Hon. W. L. Pratt,
Judge of Probate Court,
Bibb County,
Centreville, Alabama.

(1) County Commissioners — not authorized to act on blanket resolution to inspect roads and to receive pay therefor from County Treasury.

(2) County Commissioners cannot accept employment as county road supervisor — employment violates section 5024, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your request for opinion as follows:

"The Commissioners Court of Bibb County for inspecting public roads under a resolution passed by them about two years ago is drawing pay for 15 days each per month and mileage. While they present their claims for inspecting the roads, they are in reality supervisors of roads and bridges in their respective Districts. Please advise if they have the right under the law to this pay and **if they should appoint overseers or supervisors of roads.** A clear opinion from you as to what they are required to do under the law will be appreciated."

I assume from your letter that the Commissioners of your County are acting under a blanket resolution passed by them about two years ago and that the resolution does not authorize specific work to be done at a specific time. If I am correct in my interpretation of the facts presented in your letter, then it is my opinion that the Commissioners of your County have no lawful authority to draw the pay in the manner they are being paid.

This office rendered an opinion November 2, 1928 to the Chief Examiner of Accounts, the opinion being reported in Biennial Reports, 1928-1930, page 65, in which the facts presented were similar to those you present. An opinion was rendered in which it was said that "obviously this provision of the law (Section 6771, Code of 1923) contemplates an order of the Commissioners Court authorizing the specific work at a specific time." In another opinion of this office dated October 14, 1929, Biennial Report for 1928-1930, page 660, in answer to an inquiry which presented a situation similar to yours, this office held that a resolution should be passed authorizing specific work to be done at a specific time. In that opinion reference was made to another opinion of February 20, 1926, to the Judge of Probate of Jackson County (Volume One, Opinion of the Attorney General, 1926, page 96) in which it was held that a commissioner could not be employed as a road supervisor without violating Section 5024 of the Code of Alabama, 1923; also reference was made to another opinion dated November 3, 1927 to the Judge of Probate of Cleburne County (Biennial Report of Attorney General, 1926-1928, page 351) in which it was held that the road supervisor could not employ a Commissioner to superintend road work or to work on the road.

It is therefore, my opinion that the Commissioners of your County are not authorized to draw any pay for work or services in the inspection or supervision of roads of your County performed by them pursuant to the blanket order which you mentioned in your letter.

I am further of the opinion that they are not authorized to accept employment from the road supervisor or overseer on the roads of your county and draw pay therefor from the county funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 25, 1937.

Hon. E. C. Godfrey,
Sheriff, Sumter County,
Livingston, Alabama.

1. The proper fee allowed by law to the person who furnishes evidence which brings about the conviction of a person in the Circuit Court for unlawfully distilling or manufacturing or making prohibited liquors is \$50.00 Section 4626, Code of Alabama of 1923.

2. Section 4626 of the Code of Alabama has not been amended.

3. A claim, otherwise proper, for the difference between an amount which has been paid by the State of Alabama less than the \$50.00 allowed by Section 4626 of the Code of Alabama of 1923, and the \$50.00 there authorized, is a just and legal claim against the State of Alabama.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 13th which follows:

"I desire your opinion on the following of which the facts are outlined below.

"I have presented to the State Board of Administration a claim representing balances due on Distilling fees. In April, 1933, the legislature amended Section 4659 of the 1923 Code which provided a fee of \$50.00 upon conviction for having in possession a still, apparatus, appliance, etc. for the purpose of manufacturing prohibited liquors. The Board of Administration construed this amendment to apply also to Section 4626 which provides a fee of \$50.00 upon conviction for distilling or manufacturing prohibited liquor. As a result the State Board of Administration paid \$35.00 in distilling cases and in some instances only \$25.00 was paid.

"Question:

"1—

"Is the proper fee, allowed by law, \$50.00 for convictions in distilling or manufacturing liquor cases?"

"2—

Has section 4626 of the 1923 Code been amended?"

"3—

In view of the facts outlined above, is a claim for balances in distilling or manufacturing liquor a just claim against the State of Alabama?"

Your first question must be answered in the affirmative. The fee allowed by law to the person who furnishes the information which brings about the conviction of a person in the Circuit Court for distilling or manufacturing or making prohibited liquors is \$50.00, as provided by Section 4626 of the Code of Alabama of 1923. See opinion to Hon. R. H. Ford, Sheriff, Randolph County, Wedowee, Alabama, under date of March 19, 1934, Biennial Report of the Attorney General, 1932-34, at page 533; opinion of the Attorney General to Hon. R. Jack Gardner, Sheriff, Bibb County, Centerville, Alabama, under date of September 4, 1935, a copy of which is enclosed; and opinion of the Attorney General under date of March 16, 1937, to Hon. Hamp Draper, Associate Member, Board of Administration, Capitol, a copy of which is also enclosed.

The answer to your second question is in the negative. Section 4626 of the Code of Alabama of 1923 was not amended by the 1933 Act to which you refer in your letter of inquiry. The 1933 Act amended Section 4659 of the Code of Alabama of 1923 and did not alter or amend Section 4626 in any manner. See opinions, *supra*.

If the claim for balances to which you refer is a claim for a difference between an amount which has been paid to you by the State of Alabama less than the \$50.00 allowed by Section 4626, *supra*, and the \$50.00 allowed thereby, and is otherwise proper, then my answer to your third inquiry is in the affirmative. Since \$50.00 is the proper fee allowed by law for this service, as shown above, a claim for the difference between the amount less than that which has been paid for this service and the amount of \$50.00 which is allowed by law, and should have been paid, is a just and legal claim against the State of Alabama, provided the same is otherwise proper. For your information in this regard, I call your attention to an opinion of the Attorney General to Hon. Hamp Draper, Associate Member, Board of Administration, Montgomery, Alabama, under date of December 9, 1935, Quarterly Report of the Attorney General, Vol. 1, page 324, which holds that a claim for a balance due in such cases does not have to be certified, provided that the original claim, which was paid only in part, was properly certified as provided by Section 4626 of the Code of Alabama of 1923, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1937.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Section 1744 — Code of Alabama, 1923 — Municipality — At least four or more qualified electors must reside on each forty acres of land, or fraction thereof, whether platted or unplatted, in order for said land lawfully to be included in a proposed municipal corporation.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your recent letter in which you submit an inquiry as follows:

"I will thank you to render an opinion on the following section 1744, Code of 1923, just as soon as you possibly can.

"This is the part of the Section that I want an opinion upon:

"No platted or unplatted territory shall be included within such boundary unless there are at least four qualified electors residing on each quarter of each quarter section, according to government survey or part thereof, of such platted or unplatted land."

"Does this mean that there must be at least four qualified electors living on each forty acres of land or on each fractional forty that is included within the boundary of said corporation?"

It is my opinion that any forty acres of land, or fraction thereof, whether platted or unplatted, which has less than four qualified electors residing thereon, cannot lawfully be included in any proposed municipal corporation as authorized by Section 1744, Code of Alabama, 1923. The statute is clear and specific as follows:

"No platted or unplatted territory shall be included within such boundary unless there are at least four qualified electors residing on each quarter of each quarter section, according to government survey or part thereof, of such platted or unplatted lands, who assent thereto in writing by signing said petition, together with the consent of the persons, firms or corporation owning at least sixty per cent of the acreage of such platted or unplatted lands, such consent to be signified by their signing this petition."

I am unable to find any law which authorizes the inclusion of a forty acres of land or a fraction thereof upon which there resides less than four qualified electors. Therefore, you should observe the specific mandate above quoted.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon. John D. McNeel,
Administrator, Alabama
Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. County governing bodies in the "wet" counties of the State of Alabama have the right, by resolution, to levy a license on clubs, hotels and restaurants located therein for the privilege of selling liquors in accordance with the provisions of the Alabama Beverage Control Act in an amount to be set by said body not to exceed the amount of the State application or permit fee for the same privilege, which by Sub-section (b) of Section 11 of the Act is \$25.00 in towns of not less than four thousand five hundred population to not more than twenty-five thousand population and is \$100.00 in towns of twenty-five thousand population or more.

2. County governing bodies of the "wet" counties of the State have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages in such an amount as the governing body may determine, provided, of course, that the amount is reasonable, and provided, further, that if a retail dispenser operates more than one such place of business for the sale of malt or brewed beverages, then each additional license issued to him after the first license is graduated upon a basis of 33 1/3% above the cost of the last preceding license, as is provided by Sub-paragraph one of Sub-section (c) of Section 21 of the Act, *supra*.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 17, 1937, in which you request my opinion on the following question:

Question 1. Do the County governing bodies of the "wet" counties of Alabama have the right, by resolution, to levy a license on clubs, hotels and restaurants for the privilege of dispensing liquors in accordance with the provisions of the Alabama Beverage Control Act?

Question 2. Do the County governing bodies of the "wet" counties of the State of Alabama have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages?

We find the following provisions in the Alabama Beverage Control Act in regard to the right or authority of a County to levy a license on clubs, hotels or restaurants for the privilege of selling liquors in accordance with the provisions of said Act:

In Sub-section (b) of Section 11, which is the section dealing with applications for hotel, restaurant or club liquor licenses, we find the proviso that such applicants, shall, at the time of making their application to the Ala-

bama Alcoholic Beverage Control Board for license, accompany said application "with the amount or amounts of the prescribed license fee, or fees, if any, levied by the County in which it proposes to do business".

Section 12 of said Act reads as follows:

"Every applicant for a club license, a hotel liquor license, or restaurant liquor license, shall before receiving such license pay to the Board the license fee or fees, if any, levied by the county in which the place of business of such applicant is located.

"All license fees collected under this Section shall be collected by the Board for the use of the county in which such licenses were levied and in which the applicant's place of business is located, and shall be paid over to said county at quarterly intervals.

"Any county or municipality may fix a reasonable privilege or license tax on any such club, hotel or restaurant located therein, conditioned on a permit or liquor license being issued by the Board. Provided, however, no county shall levy a license as hereinabove described in any amount greater than the State permit fee herein levied for like privilege.

"No county or municipality shall have any authority to levy a license or tax on any State Liquor Store."

Sub-section (3) of Section 14 of said Act, which is the section dealing with the renewal of licenses, reads as follows:

"Licenses issued under the provisions of this Act shall be renewed annually upon the filing of applications, in such form as the Board shall prescribe, but no license shall be renewed until the applicant shall pay to the Board the requisite application fee and license fees of counties as herein above described."

In regard to the right of counties to levy a license on retail dispensers of malt or brewed beverages, we find the following provisions:

Sub-section (3) of Section 22, which is the section dealing with license fees and the distribution of revenues, reads as follows:

"In the case of a retail dispenser, such license fee as may be levied by the county in which his place of business is located, and shall be paid to the Board."

and Sub-section (7) of the same section contains the following proviso:

"License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied."

Sub-paragraph (1) of Sub-section (c) of Section 21 of said Act provides a graduated scale for licenses for retail dispensers of malt or brewed beverages where one retail dispenser operates more than one such place for the sale of malt or brewed beverages.

In view of the plain, clear and unambiguous language the above quoted provisions of the Act, it is my opinion that your questions must be answered in the following manner:

1. County governing bodies in the "wet" counties of the State of Alabama have the right, by resolution, to levy a license on clubs, hotels and restaurants located therein for the privilege of selling liquors in accordance with the provisions of the Alabama Beverage Control Act in an amount to be set by said body not to exceed the amount of the State application or permit fee for the same privilege, which, by Sub-section (b) of Section 11 of the Act is \$25.00 in towns of not less than four thousand five hundred population to not more than twenty-five thousand population and is \$100.00 in towns of twenty-five thousand population or more.

2. County governing bodies of the "wet" counties of the State have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages in such an amount as the governing body may determine, provided, of course, that the amount is reasonable, and provided, further, that if a retail dispenser operates more than one such place of business for the sale of malt or brewed beverages, then each additional license issued to him after the first license is graduated upon a basis of 33 1/3% above the cost of the last preceding license, as is provided by Sub-paragraph (1) of Sub-section (c) of Section 21 of the Act, *supra*.

You further ask in your request for opinion if it was within the competency of the Legislature of Alabama to so authorize counties to levy the license or licenses hereinabove described and discussed. It is my opinion that this question must likewise be answered in the affirmative. The general rule in this regard it stated in 37 C. J. 175, as follows:

"Except in so far as it is either expressly or impliedly prohibited or limited by the State Constitution, the Legislature may delegate the power of requiring licenses and imposing taxes on occupations and privileges within their respective limits, to municipal corporations, **counties**, villages or towns, and to other political sub-divisions or agencies of the State.

"The power of requiring licenses and imposing license and occupation taxes may be delegated by the Legislature to political sub-divisions or agencies of the State, such as to **counties**, villages or towns, and other municipal or quasi municipal corporations," (Emphasis ours).

This rule obtains in Alabama and we find the case of *Hill v. Moody*, 207 Ala. 325, which deals with this general subject, cited in *Corpus Juris* in support of the rule laid down by it in the above quoted provisions, in so far as the same applies to counties.

The case of *Hill v. Moody*, *supra*, adopts the rule laid down in the earlier case of *Mills v. Court of Commissioners of Conecuh County*, 204 Ala. 40, where the Court spoke as follows:

"Cities, incorporated towns, and **counties** have such power of taxation, as is delegated to them by legislative authority (*Phoenix Cooper Co. v. State*, 118 Ala. 143, 22 So. 627, 72 A. S. R. 143); and the legislative power to relegate the subject of taxation is unlimited; except so far as that department may be restrained by the State or Federal Constitutions

(Home v. Kennerly, 83 Ala. 608, 3 So. 683; Capital City Water Co. v. Board of Revenue, 117 Ala. 303, 23 So. 970)." (Emphasis ours).

Therefore, it seems very clear that it was within the legislative competency to authorize the county governing bodies of the various "wet" counties of this State to levy licenses in the manner set out in the Act, and hereinabove considered and discussed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon. J. F. Laseter,
Judge of Probate,
Clayton, Alabama.

Act No. 179, 1936 General Acts, page 215, does not relieve Probate Judge of duty to keep record of marriage as imposed by Sections 9000-9001, Code of Alabama, 1923.

Section 9581, subdivision 7, Code of Alabama, 1923, imposes upon Probate Judge the duty to give certified copy of record kept by him pursuant to Section 9000-9001, but he is under no duty to give certified copy of original papers not required to be kept on file in his office.

Probate Judge is not required to account to the State Treasurer for fees collected in payment of certified copy of record required to be kept under Sections 9000-9001, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter in which you submit the following inquiry:

"I desire and request your opinion on the question:—

"Whether since the enactment of Act No. 179 Extra Session 1936 Acts, page 215, Probate Judges are still required to keep records of marriage under Section 9000 and 9001 of the Code of 1923?

"You will observe that the Act of 1936 above cited provides that Probate Judges shall send the original license papers to the State Board of Health, and that the said Board is authorized to issue certified copies of any such marriage licenses and marriage certificates on file, upon request, to any applicant entitled to the same upon payment of the prescribed fee, and that said Board shall keep and preserve records of marriages obtained by it under this enactment.

"Under subdivision 7 of Section 9581 of the Code, Probate Judges are authorized to give transcripts of any paper or record required to be kept in his office. I am occasionally called on for certified copies of marriages where the license was issued and the marriage occurred in this county. Does the law still require me to keep marriage records books and authorize me to furnish certified copies therefrom, or is the effect of the said Act of 1936 to give the State Health Board exclusive authority to furnish certified copies of marriage licenses and certificates? I refer, of course, to licenses issued since said Act took effect.

"Further, if I am authorized still to issue certified copies of marriages do I have to account to the State Treasurer for the fees collected for such service?"

As I read your letter, you desire an answer to questions as follows:

(a) Does Act No. 179, General Acts of 1936, page 215 (amending Section 1153, Code of Alabama, 1923) relieve you of the duty of keeping marriage-record which you keep pursuant to Sections 9000-9001, supra. Section 9581,

(b) Does Act No. 179, supra, relieve you of the duty of furnishing certified copy of marriage record and vest that authority exclusively in the State Board of Health?

(c) If you are authorized to furnish certified copies of marriages, do you have to account to the State Treasurer for the fees collected for such service.

With reference to question (a), it is my opinion that Act 179, supra, does not relieve you of such duty. The effect of the Act so far as this question is concerned is to leave undisturbed the requirements imposed by said Sections 9000-9001 which require you to keep certain records in the manner and form set forth in said sections.

With reference to question (b), it is my opinion that you are required to furnish, upon payment of lawful charges therefor, a certified copy of the record which you keep pursuant to Sections 9000-9001, supra. Section 9581, sub-section 7, reads as follows:

"On application of any person, and on payment and tender of the lawful fees, to give transcripts of any paper or record required to be kept in his office, properly certified."

You are required to keep certain records in obedience to the mandates of said Sections 9000-9001, but you are not required to keep the original marriage licenses and certificates. Act 179, supra, requires you to forward the originals to the State Board of Health, Montgomery, Alabama. Since you do not have the originals in your custody and possession, you are not required to give a certified copy of them, but only of your records.

Answering question (c), I can find no law requiring you, if you are not on a salary, to remit to the State Treasurer of Alabama any fee which you collect for a certified copy of the marriage records in your office. If you are on a salary, all of the fees earned by you go to the County Treasury, and the fees earned by you for issuing a copy of your record should also go to

the County Treasury, credited to the County fund from which you draw your salary. However, Judges of Probate should account for all fees collected by them in their official capacity in order to determine whether or not their maximum net compensation exceeds \$6000.00 per annum (See Sec. 370-A of Revenue Act of 1935).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

1. County Financial Control Act not applicable to revenues derived from the proceeds of a tax levied for the purpose of erection, construction or maintenance of necessary public buildings or bridges or roads as provided for in Section 215 of the Constitution of 1901 and Sections 217 and 218 of the Code of Alabama of 1923.

2. Houston County may legally issue interest bearing warrants to become due in future years for the purpose of financing the construction of a jail where such warrants are to be retired only out of the proceeds derived from the tax levied under the provisions of Section 215 of the Constitution of 1901 and Sections 217 and 218 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of February 4, 1937, which is as follows:

"The Houston County Jail stands condemned. Application is filed with P. W. A. for a grant to build a Jail and Office Annex combined adjacent to the Court House. It will be necessary for the County to expend about \$50,000.00 as its share. The banks are anxious and willing to lend us the money on any kind of terms we demand and at a low rate of interest. Our bonded indebtedness stands at \$150,000.00 which is about one-third of the constitutional debt limit. Our floating indebtedness is nothing. We pay current expenses on the first of each month. We have approximately \$60,000.00 in the various funds of the County.

"Please advise if we have authority to issue interest bearing Warrants to finance this project same to fall due over a period of years; and if so, under what Act or Section of law.

"I will thank you to give me the correct procedure as it is now necessary to outline this method of financing to the officials of P. W. A. I

believe we are about to receive the grant and it is necessary that we act quickly and I will thank you for an immediate reply."

I have heretofore held in opinions recently rendered that the County Financial Control Act (General Acts, 1935, page 803) applies only to the General Fund of the County in so far as its budget provisions are concerned. In opinions rendered to Probate Judge Howard of Elmore County (Quarterly Report, Vol. V, page 38), and to Probate Judge Tompkins of Colbert County (Quarterly Report, Vol. V, page 32), I held that, regardless of the County Financial Control Act, counties could issue warrants payable at a future date out of the Gasoline Tax Fund.

The same rule, in my judgment, applies to warrants payable solely from revenues derived from taxes levied under the provisions of Section 215 of the Constitution of 1901 and Sections 217 and 218 of the Code of Alabama of 1923.

I am of the opinion, therefore, that Houston County, for the purpose of erecting a combination jail and office building, may legally issue interest bearing warrants to be retired over a period of years out of the proceeds of a tax levied and collected under the above cited constitutional and statutory provisions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1937

Hon. J. R. White, Chairman
Walker County Board of Revenue
Jasper, Alabama.

1. There is no legal obligation on County to continue paying monthly salary to County employee during the time such employee is absent from his duties as a result of injuries received in line of duty.

2. County may lawfully aid in maintaining and taking care of sick or wounded employee, who is unable to provide for himself, in a hospital.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of inquiry as follows:

"The Board of Revenue of Walker County wants an opinion as to whether County Employees receiving injuries while on duty for the County, whether or not County is liable for damage in such cases.

"Would we be within our rights to pay employees wages for the time lost caused from injuries received by him while on duty.

"Would we be within our rights to pay employees doctor and hospital bills.

"The party injured was not connected with bridge work nor accident did not happen on bridge."

It is my opinion that your County is under no legal obligation to pay the salary of an employee who is absent from his duties or work on account of his injuries received while in line of duty. I refer you to an opinion rendered by this office on the same subject, dated January 11, 1932, reported in Biennial Report of the Attorney General, 1930-1932, page 635. It appears from the letter of inquiry that one Mr. Watt who was an employee of the County was injured in line of duty and was confined to the hospital. The following question was asked: "May the County legally pay Mr. Watt the amount of his salary for each month he has been in the hospital?" The answer of the Attorney General was as follows:

"In answer will state that there is no legal obligation to the County continuing to pay the monthly salary to a County employee during the time such employee is absent from his duties due to injuries incurred in line of duty. This is a matter within the discretion of the officer or Board of the County employing such person."

Answering your second question, the County is authorized to pay, under certain conditions, the hospital expenses of an employee who is injured in line of duty. This right to pay such expenses does not grow out of the relationship of employer and employee, but is one authorized by Section 1201 of the 1923 Code of Alabama which I quote as follows:

"The board of revenue or court of county commissioners of any county in this state having a population of over twenty-five thousand people may make appropriation out of their respective county treasury to aid in maintaining and taking care of sick, and wounded persons who are unable to provide for themselves in any hospital maintained in their respective counties exclusively for the care of the sick and wounded."

I refer you to an opinion rendered by this office on April 15, 1936 reported in Volume 3, of the Quarterly Report of the Attorney General, and from this opinion I quote as follows: "In my opinion the hospital bill of the injured employee could not be paid under the authority of the above quoted Section (Section 1201) merely because the injured person was or is an employee of the County and was injured in the line and scope of his duty." This Section specifically provides that only those "who are unable to provide for themselves" may receive the benefits provided for in this Section. The question of fact arises here and one upon which this office is not in a position to rule. This is a question which addresses itself to the discretion of the Board of Revenue. I do not think it necessary to amplify the quotations which I have given above, for I believe you readily observe that your authority to pay the hospital expenses of this injured employee is dependent upon the financial ability of the employee to pay his own expenses. The financial condition of this employee is a question of fact for the determination of your Board of Revenue.

Section 1201 of the 1923 Code of Alabama, was amended as shown by Acts of 1932, page 335, but the amendment made no material change in the law other than to eliminate the minimum population as a condition to the exercise of authority under the law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 14, 1937

Hon. J. A. Keller, Superintendent,
Department of Education,
CAPITOL.

Alabama Luxury Tax Act—

Liability of State-supported Institutions of higher learning and elementary and high schools for collection or payment of luxury tax.

1. Not required to pay tax on coal, water, floor oil, mops, sweeping compound and other building supplies.
2. Not required to pay tax on lumber, nails, glass, etc. used for maintenance purposes.
3. Not required to pay tax on supplies bought for use in the classroom or laboratory, such as chalk, erasers, chemicals, etc.
4. Not required to pay tax on supplies purchased with laboratory fees collected from students for the purpose of maintaining equipment and furnishing materials used by students, such as manual training and domestic science fees.
5. Not required to pay tax on supplies purchased with laboratory fees collected from students for purpose of maintaining equipment exclusively, such as breakage fees, or contingent fees.
6. Required to collect tax on basket ball, baseball, football, and other athletic contests, where admission is charged.
7. Required to collect tax on plays, lectures, and entertainments where admission is charged.
8. Required to collect tax on tablets, pencils, erasers, etc., when sold by school book stores.
9. Not required to pay tax on materials and equipment for capital outlay purposes when purchased by state, local, or federal funds.

10. Required to collect tax on candy, nuts, chewing gum, popcorn, etc., sold in the school.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your communication of recent date which I quote as follows:

"Numerous inquiries from educational authorities have come to this office concerning the application of the recently enacted Sales Tax Law (H. B. 179, approved February 23, 1937). In order that I may have available a comprehensive interpretation of this application of this measure, I hereby request your opinion concerning the following questions:

"Are state-supported institutions of higher learning and elementary and high schools required to pay the sales tax on the following:

"1. Coal, water, floor oil, mops, sweeping compound, and other building supplies.

"2. Lumber, nails, glass, etc. used for maintenance purposes.

"3. Supplies bought for use in the classroom or laboratory, such as chalk, erasers, chemicals, etc.

"4. Supplies purchased by laboratory fees collected from students for the purpose of maintaining equipment and furnishing materials used by students, such as manual training and domestic science fees.

"5. On supplies purchased by laboratory fees collected from students for purpose of maintaining equipment exclusively, such as breakage fees, or contingent fees.

"6. On basket ball, baseball, football, and other athletic contests, where admission is charged.

"7. On plays, lectures, and entertainments where admission is charged.

"8. On tablets, pencils, erasers, etc. when sold by school book stores.

"9. On materials and equipment for capital outlay purposes when purchased by state, local or federal funds.

"10. On candy, nuts, chewing gum, popcorn, etc. sold in school."

It is my opinion that state-supported institutions of higher learning and elementary and high schools are not required to pay any tax on purchase of articles mentioned in questions numbered 1, 2, 3, 4, 5 and 9.

It is further my opinion that such institutions, elementary and high schools, should collect and remit the tax on the athletic contest mentioned in question 6; should collect and remit the tax on the entertainments, plays, lectures mentioned in question 7; should collect and remit the tax on articles mentioned in questions numbered 8 and 10.

The state-supported institutions in Alabama are the immediate agencies of the State and the property belongs to the State of Alabama. These institutions are under the immediate direction and control of the State of Alabama. *Shepherd v. Jones*, 153 So. 223. The Tax Act, Section 2, subsection (f), provides as follows:

"* * * and there shall also be excepted from the gross receipts of sales so as not to be taxed so much thereof as is derived from sales of merchandise and commodities to incorporated cities and towns and the State of Alabama, where such commodities are purchased for lawful municipal or state purposes."

This exemption of commodities sold to the State of Alabama includes the exemption of commodities sold to institutions of higher learning supported by the State of Alabama. Such institutions are a part of the State of Alabama and are specifically exempted by the terms of the Act. *Shepherd v. Jones*, supra.

The operation of elementary and high schools in the State of Alabama is a state function. *The State v. County of Tuscaloosa*, (Ms), *Williams, Superintendent of Banks v. State*, 161 So. 507, Section 191 of the School Code of Alabama read as follows:

"The general administration and supervision of the public schools and educational interests of each city shall be vested in a City Board of Education to be composed of five members who shall be residents of such city, and who shall not be members of the City Council or Commission. The members of such City Board of Education who shall serve without compensation * * *"

If a city owns a building which houses either the elementary or high school or both, items bought for repairs of building, would be exempt from tax because the cities or towns are exempt.

The incidental or laboratory fees mentioned in your letter and used to purchase supplies are a part of lawful funds exacted for operations of the schools. Sections 182 and 467, School Code, 1927. These fees are subject to the control of the State of Alabama and belong to the State, having been exacted from the pupils under the State authority. The articles purchased with these funds are not subject to tax any more than articles purchased by other public funds of the State of Alabama.

The athletic contest mentioned in question 6 of your letter, are not strictly school functions, even though, students are the only active participants therein. These contests are permitted but not required. It is my opinion that if an admission is charged therefor, that the tax imposed by Section 2 (c) of the Act should be collected and remitted.

Referring to question 7 of your letter, plays, lectures and entertainments often have cultural value and they are to be commended. However, the funds derived from such entertainment do not constitute a part of the State funds because there is no law requiring or authorizing admission charges to be made. It is my opinion that tax should be collected and remitted pursuant to the mandates of Section 2 (c) of the Act.

The Act grants an exemption to amounts received from the sale of text books used in elementary schools, high schools and institutions of higher learning, Section 4(g) but I can find no exemption of amounts received from the sale of items mentioned in question 8. The book stores should collect this tax and remit it to the State of Alabama.

I can find no exemption granted by the terms of the Act to amounts received from the sale of items mentioned in question 10 of your letter. The Act exempts the amounts received from the sale of lunches to school children in school buildings within the State when sold by any person, association or group not for profit, but grants no exemption as to the items mentioned in question 10.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

County has no Constitutional right to remit taxes already accrued.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your inquiry of April 7, 1937, in which you request my opinion as follows:

"Herewith is enclosed a copy of an Act passed by the Legislature and approved on April 21, 1936, giving Houston County the right to levy an excise Tax on gasoline. Also is attached thereto a Resolution passed by the Board of Revenue levying said tax and providing for the distribution of same which became effective at midnight of April 30, 1936. This law has recently been declared constitutional by the Supreme Court.

"At the time this law took effect there was in existence a municipal ordinance levying a one cent storage tax on gasoline stored inside the city limits of Dothan. At that time the various distributors had several thousand gallons in their tanks undistributed upon which the city's

storage tax had been paid. When this law went into effect repealing the city's ordinance, it forced the distributors to pay a county tax on that amount on hand and on which they had already paid a city storage tax. In other words they paid a double tax on the amount they had in storage at midnight on April 30, 1936.

"The city refuses to refund the municipal tax on these amounts for the reason that their law was not repealed until after the approval of the local act. We would like to reimburse the oil companies for the amount of tax they paid on the gasoline which was in storage at the time the present county wide tax took effect.

"To do this we planned, if possible, to have the distributors furnish us with a detailed distribution of these amounts on hand and hereafter to deduct from the remittance made to the municipalities the amount that the oil companies had to pay on the gasoline upon which the municipal tax had already been paid.

"Please advise if we can legally deduct from future remittances this tax which was paid the second time by the distributors."

In my opinion, you have no authority to remit this tax or to legally deduct it from future remittances.

As I understand your letter, prior to April 21, 1936, the City of Dothan levied a one cent tax on all gasoline stored within the city limits of Dothan. This ordinance was expressly repealed by the Act approved April 21, 1936, but that statute and the repeal of the ordinance did not affect the right of the City of Dothan to collect municipal taxes on storage of gasoline prior to the repeal of the ordinance.

Thereafter, and on April 27, 1936, the Houston County Board of Revenue passed a resolution levying a county tax as authorized under the Act, which resolution became effective on midnight, April 30, 1936. This tax was levied not on the storage of gasoline but on the sale and distribution thereof.

The Board of Revenue could have so worded said resolution as to except the sale of gasoline on which municipal storage tax had been paid, but this was not done. The act taxed by the resolution of the Board of Revenue is the act of selling or distributing, while the act taxed under the municipal ordinance was the storage of gasoline. It is true that as to gasoline stored prior to April 21, 1936 and sold after April 30, 1936, a double tax is collected, but this tax is upon a different act. On the other hand, as to gasoline stored after April 21, 1936 and sold prior to April 30, 1936, no tax could be collected.

Section 100 of the Constitution provides:

"Sec. 100. No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; provided, that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

Under the express terms of this constitutional provision, no obligation of any person to a State, County or Municipality can be extinguished except by payment thereof.

A very similar situation was submitted to the Supreme Court in the two cases of *Union Bank & Trust Company v. Phelps*, 228 Ala. 236, 153 So. 644, and *Union Bank & Trust Co. v. Blan*, 229 Ala. 108. In those cases the Court had before it an Act of the Legislature which contained an express exemption from payment of ad valorem taxes "including those for the current tax year 1931-1932" where the excise tax levied by the Act was paid. Union Bank & Trust Company paid the excise tax provided by the Act and sought to secure the credit allowed by the Act. The Supreme Court held that since the liability for ad valorem taxes accrued on October 1, 1932, and the Act allowing the exemption was not passed until October 22, 1932, the Legislature had no constitutional power to remit ad valorem taxes or to grant any credit therefor, although such intent was plainly expressed in the Act.

It is my opinion, therefore, that Houston County cannot remit or give credit on the tax levied by the resolution of April 27, 1936 for any amounts previously paid to the City of Dothan under the lawful provisions of their municipal ordinance.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1937

Hon. B. F. Burch,
Tax Collector, Russell County,
Seale, Alabama.

Tax title—The State of Alabama does not lose tax title to land to person who exercises acts of ownership or possession adversely to the State.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 3, 1936, which I quote as follows:

"I request your opinion on the following instance:

"A piece of property is sold to the State for taxes in the year 1924 and no one has yet bought it from the State, in the year 1930 a party gives this same property in for taxes in a different name from the name that it was sold to the State in and begins paying taxes on it and has done so ever since 1930. Six years elapsed from the sale of this property to the State before any taxes were paid on it.' What I want to

find out is, 'can this property be bought direct from the State by a different party from the one who has been paying taxes on it since 1930?'"

If the State of Alabama acquired a valid tax title to the lands which you mention in your letter, such ownership of the State is not divested by reason of a party subsequently assessing and paying taxes and exercising acts of ownership and possession over the lands in question. Such act of ownership and possession which are adverse to an individual might possibly, as to an individual, at some time under the laws of Alabama ripen into a title, but there is no adverse possession of land, title to which is vested in the State.

Second Corpus Juris, page 213, Section 443 reads as follows:

"Lands of the State (1) General Rule. The rule (against adverse possession) also applies in favor of the States of the Union; in the absence by a provision making the state subject to the statute of limitations no title by adverse possession can be acquired against the state no matter how long continued. As otherwise expressed the statute of limitations does not run against the state except with its consent. And the fact that the claimant holds under color of title does not affect the operation of the rule."

Section 8939, Code of Alabama 1923 reads as follows:

"No limitation to certain specified actions by the state to recover land. There is no limitation of the time within which the state may bring actions for the recovery of any of the land mentioned in section 7475 (3859) of this Code."

Section 7475, Code of Alabama is addressed to questions on actions to recover lands belonging to state, as well as to other lands owned by agencies of the State. The following authorities hold that there can be no adverse possession against the State: **Mobile Transfer Co. v. Mobile**, 128 Ala. 335, 30 So. 645; **Adler v. Prestwood**, 122 Ala. 367, 24 So. 999; **Love v. Love**, 65 Ala. 554.

The fact that some one has given in the land and paid taxes would not affect any rights of the State to sell the property to another who makes application.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. Fred H. McDuff,
Sheriff, Jefferson County,
Birmingham, Alabama.

April 19, 1937

Section 8616, Code of Alabama, 1923 provides for the summoning of jurors by mail, express or by summons by the sheriff.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of March 1, 1937, which is as follows:

"In this County we are serving jury notices by registered mail, which is costing the County approximately \$400.00.

"We have deputies covering the entire county serving civil and criminal papers who could serve these notices in their regular rounds and save the County a great deal of money.

"In sending these notices out by registered mail, about one-third of them are returned by the Post Office Department undelivered for various reasons, then we have to assign these notices to the different deputies covering the various territories to secure service, therefore, we request your opinion upon the following:

"May the Sheriff or his deputies serve these notices without first attempting to reach them by registered mail?

"Will appreciate your usual promptness in this matter."

I refer you to Section 8616, Code of Alabama, 1923, which Section is in words and figures as follows:

"8616. Drawing grand and petit juries from jury box.—At any session of a court requiring jurors for the next session, the judge, or where there are more than one, "then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these by mail, or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn showing the day on which the jurors shall appear and in what court they shall serve and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors."

In view of the provisions of the above quoted section, I am of the opinion the sheriff or his deputies may summons jurors without first attempting to reach them by registered mail.

This opinion is of course based on the general law. I am familiar with the fact that certain parts of the above quoted section have been changed by local legislation affecting counties having a population of 300,000 or more but

insofar as my research has gone, I have not found where such legislation affected the manner or methods by which jurors are summoned.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1937.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

County Commissioners—Have no lawful authority to pay claims filed against County by Commissioners for payment of interest on warrant held by bank.

Probate Judge and his official bond are liable for unlawful payment of interest on warrant held by bank.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"The Commissioners Court has passed various and sundry claims for which warrants have been drawn on the Gasoline Fund. At the time such warrants were drawn funds for the payment of said warrants were not in the hands of the Treasurer. These various and sundry warrants have been placed in the hands of a bank and the persons to whom such warrants were drawn have, to all intent and purposes received proceeds for such warrants from such bank. At a later date the Treasurer, when funds were available, has paid such bank various amounts to retire such warrants. In the interim claims have been filed against the County by various Commissioners for payment of interest to such bank for the period of time such warrants were held by such bank.

"1. Would the payment of interest on such warrants while held by such bank be a legal expenditure against Gasoline Fund?

"2. If illegal expenditure would Probate Judge and his official bond be liable for such expenditure?"

As I construe your letter above quoted, the Commissioners Court has been issuing warrants which anticipate gasoline funds. These warrants were subsequently paid to the owner. In the meantime claims were filed against the county by various commissioners for payment of interest to such bank for the period of time such warrants were held. You wish to know if payment of interest on such warrants held by such bank is a legal expenditure against the Gasoline Funds?

It is my opinion that such expenditures are unlawful. I know of no law which permits the Commissioners to file claims for and pay interest on an instrument which did not bear interest. I think that the expenditure was unlawful. **Hasty v. Marengo Co. Bank**, 206 Ala. 280, 89 So. 433; **Vincent vs. Gilmer**, 51 Ala. 387.

In answer to your second question, it is my opinion that the Probate Judge and his official bond are liable for the unlawful payment aforementioned. The Probate Judge had no lawful right to approve the warrant for payment of such interest. It was his duty to decline issuance of the warrant. Section 9575, et. seq. Code of Alabama, 1923.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1937.

Hon. John M. Graham,
Tax Assessor,
Jackson County,
Scottsboro, Alabama.

Court of County Commissioners—

Must supply current assessment forms to Tax Assessor.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I quote your inquiry of recent date as follows:

"My information has been that Tax Assessors were allowed and expected to purchase what supplies were actually needed in their office.

"When placing original order with printing company, Marshall Bruce, Nashville, Tennessee, I ordered only what was absolutely necessary so far as I could judge. My supply of blank assessment sheets began to get low and I saw that it was impossible to make the assessments for 1937 tax without more of said sheets and on January 8, I made requisition on special form, presented it to Probate Office of this County and on January 12, when my supply of blanks were exhausted I called at office of Probate Judge and asked if said forms had been ordered. The clerk showed me my requisition or order and asked if I did not have 1936 blanks to use. The blanks for 1936 cannot be inserted into the regular Tax Assessors book without disfiguration and inconvenience both in making books and references to these books in the future, which is quite unsatisfactory for the records of the office now and in the future. To date we are without forms."

It is my opinion that any reasonable expense that you incur for the purchase of current tax assessment forms for official use should be allowed by the county commissioners of your county. Section 9604, Code of Alabama, 1923, provides as follows:

"The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business and telephone to be paid for by the county on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expenses for his seal of office, to be paid for by the county."

According to the provisions of the foregoing section, the court of county commissioners of your county have no lawful right to refuse arbitrarily to pay the reasonable expense which you incur for your official forms.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 19, 1937.

Hon. H. E. Hendon,
Tax Assessor,
Macon County,
Tuskegee, Alabama.

Corporations—Corporations organized under Act No. 220, H. B. 275, approved July 17, 1935 (General Acts of 1935, p. 604) are exempt from ad valorem taxation to the extent provided in Section 15 thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 16, 1937, which is as follows:

"The Board of Review of Macon County has requested me to write you for a ruling as to whether the stock of merchandise of the Macon County Farmers Exchange Incorporated is subject to taxation or to exemption.

"I enclose a copy of the application for certificate of incorporation as recorded in the Probate Judge's office.

"The corporation advertises that it sells feeds, garden and field seeds, fertilizers and farming implements.

"The Board of Review is informed that the Corporation sells to anyone, whether a farmer or otherwise, but when a purchase is made

the amount and the name of the purchaser is listed. At the end of its fiscal year a net profit is declared, and each member receives his pro-rata share of the net profits."

I also have your letter of March 29, 1937, with further reference to your letter of March 16th.

The articles of incorporation which you enclosed show that the corporation in question was organized under the provisions of Article 21 of Chapter 274 (Sections 7156-7166) Code of 1923. Act No. 220, H. B. 275, approved July 17, 1935 (General Acts of 1935, p. 604) specifically repealed Article 21 of Chapter 274 (Sections 7156-7166) Code of 1923. This necessarily repealed the exemption contained in Section 7161, Code of 1923. If the corporation in question is still operating under the provisions of Article 21, *supra*, there is no exemption from ad valorem taxation. However, if said corporation has elected to come under the provisions of Act No. 220, *supra*, in accordance with Section 17 thereof, the exemption provision of Section 15 of said Act No. 220, *supra*, is applicable.

Assuming that the corporation under consideration has come under the provisions of Act No. 220, *supra*, I am of the opinion that your inquiry should be answered in the affirmative, provided the merchandise sold to non-members is not in amount greater in value than that sold to members.

Section 9 of Act No. 220, *supra*, sets out the powers of an association organized under said Act. Among its powers is to purchase for and sell to its members certain merchandise used in connection with farming and to render its members farm business service. Said section provides that it may render service mentioned in said section to non-members as well as members, provided that same shall not be in amount greater in value than such as is rendered to members. The authorization to render this service to non-members as well as members, with limitation above set out, is clearly within the powers of such an association. Therefore, in my judgment, the corporation in question is entitled to the exemption as set forth in Section 15 of Act No. 220, *supra*, provided its service to non-members does not exceed an amount greater in value than such rendered to members. The selling of the commodities mentioned in your letter to non-members is, in my opinion, such a service as authorized in Section 9, *supra*.

Section 15, *supra*, provides as follows:

"Any corporation or association organized hereunder shall pay to the state the annual permit fee of ten dollars now required by law, and shall pay all ad valorem taxes on its real and personal property, except that all cotton and all other agricultural products which have been raised or produced in the State of Alabama, title to which may be held by such corporation or association in its own right or for the use and benefit of its members, and all goods and articles purchased or acquired by such corporation, whether in or out of the state, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this state, shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this state."

The commodities purchased by the corporation and sold to non-members would be "for its own use", since such an association is authorized to make a profit and pay dividends in accordance with Section 8 of Act No. 220, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 20, 1937.

Hon. James E. Wellden,
Sheriff, Limestone County,
Athens, Alabama.

Pool or Billiard Rooms—Section 4266, Code of 1923, held not to prevent painting of front windows or entrance way so as to prevent clear view of entrance from outside of building.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 17, 1937, in which you request my opinion as follows:

"I wish your opinion and construction of Section 4266 of the Code of 1923, volume 2, relative to the operation of pool rooms.

"We have in our town a pool or billiard room from which we have seized different types of slot machines and condemnation proceedings are now in progress.

"This same pool or billiard room is located on one corner of the public square. The operator thereof has his windows and front entrance so painted that the interior is hidden from view. Please advise if this is a violation of the law."

In reply I wish to advise you that Section 4266, Code of Alabama, 1923, relative to obstructions to pool rooms does not appear to have been construed by either the Alabama Supreme Court or the Alabama Court of Appeals. A search of the Codes of other States reveals no similar statutes.

Section 4266, Code of 1923, provides as follows:

"Section 4266. Screens, blinds, partitions, etc., forbidden.—No billiard room operating under the provisions of this article shall allow or permit any screens, curtains, blinds, partitions or other obstructions to be placed between the entrance, or room where billiards are played and back or rear wall of such billiard room. A clear view of the entire interior from the entrance to the rear of such room must be maintained at all times. No partition forming rooms, stalls or other enclosure where the public

congregate, shall be permitted. This provision, however, shall not be construed to prohibit the maintenance of wash rooms, and toilet rooms for proper purposes, or the maintenance of closets for storing purposes exclusively."

I wish to particularly call your attention to the sentence,

"A clear view of the entire interior from the entrance to the rear of such room must be maintained at all times." (Emphasis ours).

It is my opinion that this sentence clarifies this section. In my judgment the painting of the front windows and front entrance so that the interior may not be seen from the outside of the building does not violate the spirit or the letter of this section, it being that the legislature here intended to prevent any obstruction being placed between the front entrance and the back wall of the room, in which a billiard or pool room is being operated, with the exceptions noted within the statute itself. This construction is in my judgment fixed by the words of the statute as follows: "No billiard room operating under the provisions of this article shall allow or permit any screens, curtains, blinds, partitions, or other obstruction to be placed between the entrance, or room where billiards are played, and back of rear wall of such billiard room."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 20, 1937.

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Alabama Beverage Control Act—

A municipality located in a dry county in Alabama cannot levy a license on a business located in a wet county in Alabama but within the police jurisdiction of said municipality for the privilege of selling malt or brewed beverages at retail.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 24, 1937, which reads as follows:

"I would thank you to write me with full particulars in regard to the following.

"Can the City of Boaz, in Marshall County, which is a dry county collect City tax from the Oak Park Service Station, which is a mile and 3/10 from the City limits and over a mile in **Etowah County**, which is a 'wet' county?

"The Oak Park Service, which is owned by Mr. and Mrs. James Bishop, sells lunches, beer, groceries and gasoline, and I want to know if the City of Boaz can collect City tax on any of these items, when their business is over in another county.

"Also please advise me what jurisdiction they have out in **Etowah County**, and how far out? I would like this information at your earliest convenience, as the City of Boaz is pressing the above parties for taxes. For your information, I wish to say that the Oak Park Service has been doing business continuously for 17 years, and the City of Boaz has never asked for a tax until **Etowah County** went 'wet' Boaz went nearly 100% 'dry'.

In my opinion, the City of Boaz, which is located in Marshall county, a dry county, cannot levy a license on a business located in **Etowah County**, a wet county, but within the police jurisdiction of the City of Boaz, for the privilege of selling malt or brewed beverages at retail.

It is true that the Supreme Court of Alabama, in the case of **White v. City of Decatur**, 144 So. 873, held that a municipality could levy a business or occupational license on a business located within its police jurisdiction, even though said business was located in a different county from that in which the municipality was located. However, as pointed out in that case, the authority for levying such a license on a business within the police jurisdiction but outside the corporate limits of a municipality is found in Act No. 580 of General Acts, 1927, at page 674, which reads, in part, as follows:

"That any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town and without the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like businesses, trade or profession done within the corporate limits of such city, fees and penalties excluded."

It will be noted from the above quoted provision of the 1927 Act that the license which a municipality may levy on a business within its police jurisdiction but without the corporate limits thereof may not exceed more than one-half the amount charged as a license for a like business within the corporate limits of the City.

The City of Boaz could not levy a valid license within its corporate limits on businesses for the privilege of selling malt or brewed beverages at retail because the sale of such beverages is prohibited by the Alabama Beverage Control Act in all dry counties within the State of Alabama. See opinions of the Attorney General to Hon. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937, a copy of which is enclosed for your information. A municipal ordinance inconsistent with the general policy of this State, as declared in its general legislation, is void unless expressly authorized by the Legislature. **Ward v. Markstein**, 196 Ala. 209.

Therefore, since an ordinance by the City of Boaz, located in the dry county of Marshall, on a business for the privilege of selling malt or brewed beverages at retail within its corporate limits would be void as inconsistent with the general policy of the State, as declared by its general legislation, to wit: The Alabama Beverage Control Act, supra, it necessarily follows that said municipality could not levy a license for a like privilege on a business located in the wet county of Etowah but within the police jurisdiction and without the corporate limits of said municipality. One-half of nothing equals nothing.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 21, 1937.

Hon. W. L. Hobbs,
Clerk, Russell County,
Phenix City, Alabama.

1. The five per cent commission allowed Solicitors as a fee on forfeitures should be taxed as costs and added to the amount of the judgment forfeiture.

2. A commission on a judgment or forfeiture is allowed the Sheriff as on civil judgments.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of November 3, 1936, which I quote as follows:

"At the last term (October, 1936) of Circuit Court four bonds totaling \$1,300.00 were forfeited against a single defendant and sureties. Execution for the amount of the bonds plus 5% for Solicitor's fee and Sheriff's fee as provided under Sections 3738-3741 as same relates to fees of Sheriffs and Solicitors were issued.

"Kindly advise if this execution was issued properly or should it have been issued for only the amount of the bonds, and if for only the amount of the bonds can I pay court costs for the amount collected."

According to the ruling of this office made on August 5, 1929, Biennial Report, 1928-1930, page 563, to the Chief Examiner, Department of Examiners of Accounts, you are correct in adding to the judgment on forfeiture the five per cent taxable as a Solicitor's fee on commission. I quote from this opinion as follows:

"Solicitors' fees and commissions are to be taxed and collected as other costs, which shows plainly to my mind that the fees and commissions of Solicitors are regarded as costs. Section 3738 Code of 1923."

With reference to the right of the Sheriff to collect a commission on the amount of the judgment, I refer you to an opinion of this office, dated April 25, 1931, Biennial Report of the Attorney General, 1930-32, page 243, from which I quote as follows:

"It is true this Section is found under Schedule of Fees in the Civil Code, Volume 3, and it is true that forfeiture has grown out of criminal process, but in construing this matter we must remember that as soon as conviction is had or a judgment is confessed or a forfeiture is taken, the enforcement of such judgment, or confession, or forfeiture becomes a civil matter and the collection of the same is, likewise, a civil procedure and the fees in such matters are regulated by law pertaining to civil procedure."

According to the opinions issued from this office, you were correct in issuing an execution on final judgment of forfeiture by which the fees of the Solicitor may be collected in addition to the amount of judgment on forfeiture. The Sheriff collects his own commissions without inclusion in execution as in civil executions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 22, 1937.

Hon. Bart B. Chamberlain,
State Solicitor,
Mobile County,
Mobile, Alabama.

Taxation—Act No. 126, approved February 23, 1937.

1. Retailer who sells materials to contractor for erection of school buildings contracted prior to March 1, 1937, with local school boards who use federal grants to pay the contractor, must account to State of Alabama for Sales Tax on materials sold to the contractor after March 1, 1937, unless sale was completed prior to March 1, 1937. An incomplete sale is not sufficient to relieve retailer from payment of tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your recent inquiry which I quote as follows:

"Will you kindly give me an opinion on the following question under the Gross Sales Tax Act.

"Assume that a Mobile Wholesale Merchant has a customer who is a contractor and that the contractor has purchased from the merchant at

a definite, specific price a considerable quantity of goods to be used in the construction of certain school buildings in one of our interior counties. The wholesale merchant has agreed to sell to the contractor at definite prices all of said material and the contractor has placed his order with the merchant at said prices for delivery as the jobs on the school buildings progress and the materials are needed. Some of these items may not be delivered for several months. These school buildings are being financed for the most part by federal money grants made to the local boards of school commissioners, and the commissioners put up whatever balance of the amount is needed. The contractor has agreed to construct the buildings for a definite sum of money and in making his contract he relied absolutely on the prices fixed and given him by the merchant and upon which the merchant has agreed to deliver. The contractor cannot increase his contract price and will refuse to pay any sales tax. Is it obligatory upon the merchant under the sales tax act to demand of the contractor a two percent sales tax?"

It is my opinion that the wholesale merchant of your city is responsible under the Chichester Tax Act No. 126 for the payment of the tax on the gross revenue received by him from the sale of materials to the contractor mentioned in your letter, prior to March 1, 1937, and delivery thereof taking place after March 1, 1937, unless such sale is completed prior to March 1, 1937. The wholesale merchant is not relieved from accounting to the State of Alabama for the tax, on a sale which was incomplete on March 1, 1937.

I do not think it would make any difference that the funds received by the county board and used to pay the contractor were grants from the Federal Government. The contractor is in no way a part of the Federal Government nor is he an agent of the Federal Government in erecting the school building. He is an independent contractor and for that reason is in no better position to claim exemption from taxes imposed by the Chichester Act, supra, than would be any other person who contracts to erect a school building and receives pay from sources entirely disconnected and disassociated from Federal or State Funds.

I invite your attention to a sentence in Section 1 of the Alabama Sales Tax Act which I quote as follows:

"Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold."

The foregoing provision impresses a definite responsibility upon the wholesale merchant to account for the tax on sales of building materials to contractors. The above quoted provision definitely impresses and characterizes such sales as retail sales.

A sale is complete in my judgment only when the contracting parties have reached a mutual agreement as to quality, quantity, price and title thereto has passed.

In order for a title to pass, the goods must be in existence and they must be segregated and set apart as the property of the purchaser, with nothing to be done by either party except to pay the purchase price and deliver the goods. *McCrae vs. Young*, 43 Ala. 622; *Rolfe vs. Huntsville Lumber Company*,

62 So. 537, 8 Ala. App. 487; Southern States Company vs. Long, 73 So. 148. If the purchaser could maintain an action of detinue for the property, then the sale may be said to be complete. But could detinue be maintained for materials which are not in existence or which have not been segregated and set apart as the property of the plaintiff? A completed sale is to be distinguished from an incompleting sale. The former supports an action based on title and the latter supports an action seeking damages for breach of contract. Therefore, if the sale is completed after March 1, 1937, it becomes subject to the tax.

It is further my opinion that passage of a law making performance of a contract more burdensome on the contractor does not excuse the wholesale merchant from collection and remittance of a lawful tax, nor is the passage and adoption of such a tax act any defense to the contractor against payment of the tax to the merchant.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 23, 1937.

Honorable C. E. McNatt,
Circuit Clerk,
Franklin County,
Russellville, Alabama.

Fines and Forfeitures—

Fines imposed for violation of General Acts, 1935, page 240, should be paid to the County Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 12, 1937 in which you request my opinion as follows:

"A person is tried on an affidavit or complaint containing two counts. The first count of the affidavit charges that the defendant violated Senate Bill 174 as shown in the General Acts of 1935, page 240, by driving a motor vehicle upon a road or highway and failing to come to a complete stop when approaching a school bus taking on or discharging school children. The second count of the affidavit charges the defendant with reckless driving in violation of Section 49 of the Highway Code of Alabama shown in the general Acts of 1927, page 365.

"The jury found the defendant guilty as charged in the first count of the affidavit of failing to stop his vehicle when approaching a school bus taking on or discharging school children, and fixed his fine at \$25.00.

"Please advise me if the \$25.00 fine should be paid into the fine and forfeiture fund of the county or to the State Highway Department? Please advise me to whom I should pay the \$25.00 fine."

In my opinion the fines imposed for the violation of the General Acts 1935, page 240, should be remitted to the County Treasurer to be deposited in the County Fine and Forfeiture Fund.

I call your attention to the fact that the above named statute (General Acts 1935, page 240) makes no definite provision for the disposition of fines collected for violation of its provisions.

Section 4038 of Michie's Code of 1928, provides as follows:

"Section 4038. Fines to go to county, and judgment accordingly.— All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the State, for the use of the particular county." See also authorities cited under the above quoted Code Section.

Premises considered, it is my opinion that fines here considered should be paid into the County Fine and Forfeiture Fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 27, 1937.

Hon. D. E. Laslie,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

Uniform Veterans Guardianship Act.

Guardians appointed under Uniform Veterans Guardianship Act not entitled to commission on bonds received in exchange for Adjusted Service Certificate.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"1. Under the Uniform Veterans Guardianship Act, 'A' is guardian of 'B'. 'B' had an Adjusted Service Certificate. 'A' made application for

bonds on the Certificate which he has received. As such guardian is he entitled to commission on the amount of bond? If so, how much?

"2. The Bank of Tuskegee was guardian for 'B'. The bank closed and 'A' is the succeeding guardian. An Adjusted Service Certificate was among the assets received by 'A' as the succeeding guardian from the Bank of Tuskegee. 'A' made application for the bonds on the Adjusted Service Certificate and has received the same. Is he entitled to commission on the bonds, and, if so, how much? The Bank of Tuskegee, of course, never received any commission on the Adjusted Service Certificate."

In answer to both of your questions, I am of the opinion that "A", the guardian, may not receive commission on the bonds received in exchange for Adjusted Service Certificate. Under Section 11 of the Uniform Veterans Guardianship Act (Section 8134 (11) Michie's 1936 Supplement to the Code of Alabama) compensation payable to the guardian is limited to 5% of the income of the ward. In my opinion, the proceeds of an Adjusted Service Certificate are part of the corpus of the estate and not income. *Gilbert v. Hines*, 32 S. W. (2d) p. 76. No compensation, therefore, is payable on such an amount.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 27, 1937.

Hon. C. E. McNatt, Clerk,
Law & Equity Court,
Franklin County,
Russellville, Alabama.

Fine and Forfeiture—

Fine and Forfeitures assessed for violation of Section 49, General Acts of 1927, page 365, held payable to State Treasury.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 12, 1937, in which you request my opinion as follows:

"A person is charged in an affidavit or complaint with the offense of reckless driving of a vehicle as charged in Section 49 of the Highway Code of Alabama as shown by the General Acts of 1927, page 365. Said person, with the consent of the Court, pleaded guilty to an attempt to commit the offense of reckless driving of a vehicle upon a highway and the court fixed his fine at \$5.00. Should this fine be paid into the

fine and forfeiture fund of the county or should the fine be paid to the State Highway Department? To whom should this \$5.00 fine be paid?"

In reply I wish to advise you that in my opinion fines imposed for reckless driving, under the provisions of the General Acts of 1927, page 365, Section 49, should be forwarded to the State Treasurer.

I call your attention to Section 106, General Acts of 1927, page 390, which provides for the disposition for fines and forfeitures of this nature in part as follows:

"Section 106. FINES AND FORFEITURES. All fines and forfeitures collected upon conviction or upon conviction of bail of any person charged with a violation of any of the provisions of this Article constituting a misdemeanor, shall be within thirty days after such fine or forfeiture is collected forwarded to the State Treasurer."

I note that you ask specifically concerning a fine of five dollars assessed by a Court upon "an attempt to commit the offense of reckless driving of a vehicle upon a highway".

In my opinion there is no authority of law for the assessment of a fine for an attempt to commit the offense of reckless driving of the vehicle upon the highway. I presume that the Court in assessing this fine intended to follow the provisions of Section 3307, Code of Alabama, 1923, which provides as follows:

"Section 3307. Jury may find the attempt.—Upon the trial of an indictment for any offense, the jury may find the accused not guilty of the offense, charged in the indictment, but, if the evidence warrants it, guilty of an attempt to commit such offense, without any special count in the indictment for such attempt."

You will note that the law as stated in the above Section authorizes a jury upon the trial of an **indictment** to find that the offense charged in the **indictment** was not committed, but if the evidence warrants it, the defendant may be found guilty of an attempt to commit such an offense. I do not know of any authority of law authorizing the court to find a defendant guilty of an attempt to commit the offense of reckless driving a vehicle upon a highway. See **Hutto v. State**, 169 Ala. 19 and authorities cited therein.

In my judgment a five dollar fine here is unwarranted.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 28, 1937.

Hon. Robert T. Simpson, Jr.,
Solicitor of Eleventh Judicial Circuit of Alabama.
Florence, Alabama.

The Sheriff receives his pay for abating liquor nuisances under
Section 4682, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 31, 1937 in which you request my opinion
as follows:

"The Sheriff of Colbert County has asked me to get your opinion
on the following questions. (1) How may he obtain pay for his ex-
penses in padlocking a joint under order of the Court? He had to pay
for some lumber and pay for a lock and go to other expenses and of
course the defendant is execution proof. (2) Certain beer joints in his
county are creating considerable disturbance on Sunday. I have ad-
vised him that beer joints even though authorized to operate under
the Alabama Beverage Control Act must be governed by the Sunday
statute and cannot open and run on Sunday. What the Sheriff wants
to know is can the Sunday law also apply to dance halls. He has re-
ceived complaints that from twelve midnight until daylight on Sunday
these dance halls, night clubs, etc., create considerable disturbance and
he wants to enforce the Sunday statute against them if it applies."

Answering your first inquiry, I call your attention to Section 4682, Code
of Alabama, 1923, which is as follows:

"Section 4682. Fees and allowances to officers making seizures when
and how paid.—There shall be allowed the officer making the seizure
under such writ in an injunction case the sum of three dollars and
the sum of ten cents for every mile traveled in making the seizure,
together with such reasonable sum as the court may deem just for
necessary expenses incurred in transporting and providing storage for
liquors and beverages and other movable property seized; all which
costs shall be taxed in the bill of costs, and if not collected from a
defendant, then shall be taxed and paid as in criminal prosecutions in
which the state fails; and the costs in such injunction case, unless
charged against some party defendant by the court and collected from
him, shall be paid as in criminal cases in which the state fails, upon
the court making an order to that effect."

I think the above statute is just about as plain as it can be made and
any comment I might make on the same would not add anything to it.

As to your other requests set out above, I have answered these in an-
other opinion to you containing the same propositions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

April 28, 1937.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

County not liable for tax on merchandise and commodities purchased for lawful county governmental purposes under Alabama Luxury Tax Act.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 2, 1937, requesting my opinion as follows:

"It is our understanding that under Sales Tax Bill recently passed by the Legislature and going into effect March 1, 1937, that State and cities are relieved from this tax. Please advise whether or not the county must pay this tax for purchases for county government.

"Can the State tax the county which is an arm of the State government? Early reply is requested."

In my opinion, a county of the State of Alabama is not liable for the tax imposed by the Alabama Luxury Tax Act (H. B. 179) on such merchandise and commodities as are purchased for lawful county governmental purposes.

Answering your second inquiry first, the State clearly has the power to levy any tax upon the county. However, since the funds of the county are derived only from taxes, any tax upon the county will require the levying of a tax by the county to pay the tax to the state, and a tax statute will not be interpreted as taxing the county unless such is the clear legislative purpose. *State v. City of Montgomery*, 228 Ala. 93, 151 So. 856.

The question therefore is whether it was the intention of the Legislature expressed in the Luxury or Sales Tax Act to levy a tax on purchases by the county.

The first question to be decided is whether the Luxury Tax Act is a tax against the seller or the consumer. If it is a tax upon the seller, purchases by the county would not be exempt unless such exemption were clearly expressed in the act. On the other hand, if the tax is upon the consumer, the purchaser, which in this instance would be the county, it will not be interpreted to tax the county unless there is a clearly expressed legislative intention to do so.

This question has been fully considered and briefed on both sides. Similar Acts have been construed by the Supreme Courts of various states, some acts being held to be taxes upon the seller, *People v. Herbert's of Los Angeles*. (Cal.) 39 Pac. (2) 829; *Meyer Construction Co. v. Corbett*, 7 Fed. Supplement 660. On the other hand, the Supreme Court of Kentucky, on

a very similar statute, has held such a tax is a tax upon the consumer. **City of Covington v. State Tax Commission**, 257 Ky. 94.

Since a slight change in the words of the statute might change the construction thereof, decisions from other states are of but little guidance in construing this statute. To reach the proper construction requires a consideration of the legislative history of the act and also a consideration of previous statutes passed by the same session of the Legislature.

As you know, this session of the Legislature levied a so-called Gross Receipts Tax, requiring every person, firm or corporation operating one or more retail stores to pay, in addition to all other licenses or taxes, "as a license or privilege tax for the privilege of doing business, an amount equal to 1½ per cent on the gross sales of said business."

Section 2 of the Sales Tax Act provides:

"There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm or corporation engaged or continuing within this State in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character * * * an amount equal to two per cent of the gross proceeds of sales of the business, except where a different amount is expressly provided herein."

Had this been all of the act, it is clear that such tax should be construed as a privilege or a license tax levied upon the seller. However, the form of the tax, whether it is designated an excise tax or a license tax, is not conclusive. **State vs. City of Montgomery**, 228 Ala. 93, 151 So. 856.

Such act should be construed as a whole and the legislative intention reached from the whole of the act rather than from the provisions of any one section or from the term applied to the tax by the Legislature.

Both the Gross Receipts Tax and the Sales Tax provide that credit sales are not included in determining the measure of the tax until collection of such credit sales shall have been made, so this provision does not assist in reaching a correct interpretation.

In Section 24 of the Sales Tax Act it is provided:

"It shall be unlawful for any person, firm, corporation, association or co-partnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same."

While it is a matter of common knowledge that indirectly all taxes are passed on to the consumer, this act requires that such taxes be passed directly to the consumer. Section 26 of the act provides that for the purpose of more efficiently securing the payment of the tax, the State Tax Commission may provide for certain tokens "to enable purchasers and recipients of taxable sales, service, and transactions, to pay the tax."

Construing the act as a whole, therefore, and in the light of the Gross Receipts Tax, my conclusion is that the tax should be construed as a tax on the consumer rather than on the seller. The fact that the first act was called a tax on gross receipts, while this act is by its terms called a "sales tax"; the fact the gross receipts tax made no provision for passing the tax on to the customer, while the sales tax expressly requires that the tax be passed on to the consumer and sets up the machinery for supplying tokens to enable the purchaser to pay such tax, indicates a clear legislative intention that the tax shall be a tax upon the "purchasers and recipients of taxable sales."

Having determined this, the next question becomes whether the county is exempted from paying the tax levied on other consumers. In *State v. City of Montgomery*, 228 Ala. 93, 151 So. 856, the Supreme Court stated:

"The funds of a city and county are derived both from property taxes and excises, if that is material to this inquiry. In any event, it is the imposition of a tax to pay a tax. **Unless such is the clear legislative purpose, an act will not be so interpreted.**"

Again in *Van Brocklen v. Anderson* 117 U. S. 151, 29 L. ed. 845, 852 we find the following:

"General tax acts of a State are never **without the clearest words**, held to include its own property or that of its municipal corporations, although not in terms exempted from taxation. *Buckley v. Osburn*, 8 Ohio, 180, 187; *Piper v. Singer*, 4 Serg. & R. 354 *Directors of the Poor v. School Directors*, 42 Pa. 21; *People v. Doe*, 36 Cal. 220; *Worcester Co. v. Worcester*, 116 Mass. 193; *Trustees of Public Schools v. Taylor*, 30 N. J. Eq. (3 Stew.) 618; *Trustees of Public Schools v. Trenton*, Id. 667; *Rochester v. Rush*, 80 N. Y. 302; *State v. Hartford*, 50 Conn. 89. The reasons for this have been well stated in the cases in Massachusetts and New Jersey. Mr. Justice Devens, delivering the opinion of the Supreme Judicial Court of Massachusetts, said: 'The property of the Commonwealth is exempt from taxation because, as the sovereign power, it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions.' 116 Mass. 194. And Mr. Justice Depue, delivering the opinion of the Court of Errors of New Jersey, said: 'The immunity of the property of the State, and of its political subdivisions, from taxation, does not result from a want of power in the Legislature to subject such property to taxation. The State may, if it sees fit, subject its property and the property owned by its municipal divisions to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that

the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the State or its municipalities. Such property is therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it.' 30 N. J. Eq. (3 Stew.) 681.

"In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction."

There is no clear legislative purpose to require counties to pay such sales tax on purchases for county governmental purposes. It is true that the Legislature in subsection (f) of Section 2 of the Act granted an express exception of sales to the state and the city. It did not except sales to counties. From this omission of counties there is some argument that by the application of the maxim, "*Expressio unius est exclusio alterius*". i. e. the expression of one thing is the exclusion of another, that by the express exception of states and cities the exception of counties is excluded. In my opinion, such maxim has no application to this question. The theory of this maxim is that where the Legislature expressly exempted states and cities, but failed to expressly except counties, they indicated a legislative intent that counties should not be excepted. However, the courts have recognized that such omission might be through mere inadvertence, and that the maxim should be employed advisedly. *Ramsey Motor Co. v. Wilson*, (Wyo.) 30 P. (2d) 482. In *Colquhoun v. Brooks*, Law Rep. (1887) 19 Q. B. D. 400-406, Judge Wills remarked:

"I may observe that the method of construction summarized in the maxim '*Expressio unius est exclusio alterius*' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the '*expressio*' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind."

On review of this case, Law Rep. (1888) 21 G. B. D. 52-65, in the Court of Appeals, the following language was used by Lopes, L. J.:

"The maxim '*Expressio unius, exclusio alterius*', has been pressed upon us. I agree with what is said in the Court below by Willis J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes and documents. The '*exclusio*' is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

To reach such a conclusion from this act would be anomalous because Section 21 providing for the division and distribution of the proceeds of the tax provides that certain portions thereof shall go to the various counties. To hold that purchases by the county are subject to the sales tax would not only require the county to levy other taxes to pay such tax, but would require the county to pay a tax, a portion of which is returned to the county.

In my opinion, the omission of an express exception of purchases by the county is not such a clear legislative purpose to impose the tax upon the county as is required by the Supreme Court decisions cited above.

I, therefore, advise you that a county is not liable for the tax in question on merchandise or commodities purchased for lawful county governmental uses.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 29, 1937.

Honorable J. H. Green,
Circuit Clerk,
Morgan County,
Decatur, Alabama.

Costs:—When a defendant who has been convicted of a felony and paroled by the Governor before said defendant was delivered to the penitentiary; and the Governor fails to remit the costs, said costs constitute a charge against defendant and may be collected from Fine and Forfeiture Fund of the county upon execution and return no property found.

Costs:—No costs payable by Convict Department until convict is delivered to penitentiary officials.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please give me your opinion as to what becomes of the costs of convictions in the following instances:

"1. When the defendant is convicted of a felony, and he appeals, and his case is affirmed—and the Governor paroles defendant before he is delivered to the penitentiary—what becomes of the costs of conviction?"

"2. When the defendant is convicted of a misdemeanor, and he appeals, and his case is affirmed—and the Governor paroles defendant without requiring costs to be paid—what becomes of the costs of conviction?"

In reply to your first inquiry I wish to advise you that in my opinion when the Governor paroles a defendant who has been convicted of a felony

before he is delivered to the penitentiary and fails to remit the costs, then such costs cannot be paid by the Convict Department. I refer you to Section 3670, Code of Alabama 1923, which provides as follows:

"No cost shall be paid until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in succeeding cases shall be paid when he is delivered to such officials."

The costs in a case of this kind constitute a charge against the defendant and may be collected from the Fine and Forfeiture Fund upon issuance of execution and return "No Property Found". I refer you to *Michie's Code* 1923, Section 4039. See also *Mims v. State*, 180 Ala. 511-513, 61 So. 811. See also opinion of Attorney General, Quarterly Reports, Vol. II, page 118 and authorities therein cited.

Your second inquiry is answered by an opinion of the Attorney General, found in Quarterly Reports, Vol. 1, page 242, to which I wish to refer you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 1, 1937.

Hon. John D. McNeel,
Administrator, Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Counties and municipalities held to share with the State only in the net profits derived from the proceeds of the State Liquor Stores and not in the revenue derived from the State Tax on malt or brewed beverages and the State application, filing, permit and license fees provided by said Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you request my opinion on the following question:

Do counties and municipalities share with the State, in the percentages provided by sub-section (c) of Section 9 of the Alabama Beverage Control Act, in the net profits from the proceeds of the State Liquor Stores only, or do they share with the State, according to the percentages set forth in said section, in the revenue derived from the State Tax on malt or brewed beverages and the State application, filing, permit and license fees provided by the said Act, as well as in the net profits of the proceeds of the State Liquor Stores?

It is my opinion that the counties and municipalities share with the State, according to the percentages provided by subsection (c) of Section 9 of the Alabama Beverage Control Act, **only** in the net profits derived from the proceeds of the State Liquor Stores, and that they do not share with the State in any manner in the revenue derived from the State Tax on malt or brewed beverages and the State application, filing, permit and license fees provided by the said Act.

Sub-section (c) of Section 9 reads in part as follows:

"The net profits derived from the proceeds of the State Liquor Stores under the provisions of this Act shall be paid out and applied monthly as follows: Fifty per cent shall be covered into the General Fund of the Treasury of the State; ten per cent shall be covered into the Treasury of the State to be used and the same is hereby appropriated exclusively for Old Age Pensions, and for other purposes of the State Department of Public Welfare. Ten per cent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds; ten per cent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties and shall be paid to them to be used by them exclusively for the purpose of Public Health, Old Age Pensions, and for other purposes of the County Departments of Public Welfare; twenty per cent of the net profits of each Liquor Store to be paid to the municipality in which such State Store is located. Payment to be made to each of the several counties and incorporated towns and cities by warrant of the State Comptroller not later than the 20th of each month following collection. No liquor store shall be placed or maintained outside a municipality, provided that in counties not having a municipality such store may be placed in the County Seat." (Emphasis ours.)

You will note that the above quoted provisions, which are the **only** provisions in the Act providing for a distribution of monies derived under the Act between the State, counties, and municipalities, refer **only** to the net profits derived from the proceeds of the State Liquor Stores and that they do not refer to the revenue received from the State Tax on malt or brewed beverages or from the application, filing, or permit license fees levied by the State under the provisions of the Act. Therefore, in my opinion, it is very clear that the counties and municipalities **only** share in the net profits derived from the proceeds of the State Liquor Stores and that they do not share in the other revenue received by the State from the taxing and licensing provisions of the Act. In my opinion, the plain, clear and unambiguous wording of the above quoted provisions of the Act admit of no other interpretation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 6, 1937.

Hon. R. E. Smith,
President Pro Tem,
Jefferson County Commission,
Birmingham, Alabama.

Alabama Beverage Control Act—

Counties held to be without authority to levy a bottle tax on malt beverages.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your letter of April 20, 1937, has been received. The letter follows:

“Please advise whether in your opinion Jefferson County is authorized to levy a bottle tax on malt beverages. It is meant by this, a tax on the sale of each bottle of beer or other malt beverages in Jefferson County.”

In my opinion, Jefferson County is without authority of law to levy a bottle tax on malt beverages sold in that county.

In an opinion of this office under date of April 1, 1937, addressed to Hon. John D. McNeel, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, we dealt with the subject of what licenses counties might levy by virtue of the authority granted to them by the provisions of the Alabama Beverage Control Act. Enclosed find a copy of this opinion for your information. In this regard, it will be noted that the licenses which counties have the authority to levy by virtue of the provisions of the Alabama Beverage Control Act, are the only licenses, taxes or fees which the Act authorizes the counties to levy.

It is a well-settled principle of law that county governing bodies have only such authority to levy licenses and taxes as is granted to them by the Legislature. Counties have no inherent power to levy licenses or taxes. In dealing with this particular question, the Supreme Court of Alabama, in the case of Phoenix Carpet Company vs. State, 118 Ala. 143, speaking through Mr. Chief Justice Brickell, had this to say:

“Counties having no inherent power of taxation; they have only such power as is delegated to them, and must have express authority of law to sanction the taxes they demand. Cooley on Taxation, 678; Burroughs on Taxation, Section 138.”

Since the Alabama Beverage Control Act grants no authority to the county governing bodies, whose power and authority to tax is, as is shown above, strictly limited to the power and authority delegated to them by the Legislature, it is my opinion that Jefferson County is without authority of law to levy a bottle tax on malt beverages sold in that county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 6, 1937.

Hon. O. L. Andrews,
Clerk Circuit Court,
Tenth Judicial Circuit of Alabama,
Birmingham, Alabama.

Alabama Beverage Control Act—

1. County Commission of Jefferson County held without authority to levy license or privilege tax on retail dispensers of malt beverages to be computed on the basis of $\frac{1}{2}$ c on each bottle or can of such beverage to be sold by such retail dispensers.

2. County Commission of Jefferson County held without authority to levy license or privilege tax on retail dispensers of malt beverages to be computed on the basis of $\frac{1}{4}$ c on each 12-ounce bottle or can of such beverages to be sold by such retail dispensers.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

We have your letter of April 20, 1937, in which you request an official opinion on the following questions:

“(1) Does the County Commission of Jefferson County have the authority to levy a license or privilege tax on malt beverages of one-half ($\$0.\frac{1}{2}$) cent on each twelve ounce bottle or can, or fractional part thereof, of beer, ale, etc.?”

“(2) Does the County Commission of Jefferson County have the authority to levy a license or privilege tax on malt beverages of one-quarter ($\$0.\frac{1}{4}$) cent on each 12 ounce bottle or can, or fractional part thereof, of beer, ale, etc.?”

It is my opinion that both questions propounded by you must be answered in the negative.

In an opinion under date of April 1, 1937, to Hon. John D. McNeel, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, this office held among other things the following.

“County governing bodies of the ‘wet’ counties of the State have the right, by resolution, to levy a license on retail dispensers of malt or brewed beverages in such an amount as the county governing body may determine, provided, further, that if a retail dispenser operate more than one such place of business for the sale of malt or brewed beverages, then each additional license issued to him after the first license is graduated upon a basis of 33 $\frac{1}{3}$ % above the cost of the last preceding license, as is provided by sub-paragraph 1 of Sub-section (c) of Section 21 of the Act, supra.”

As pointed out in that opinion, a copy of which is enclosed for your information, the following provisions in regard to the right of a county to levy

a license on retail dispensers of malt or brewed beverages appear in the Alabama Beverage Control Act: Sub-section 3 of Section 22, which is the section dealing with license fees and the distribution of revenues, reads as follows:

"In the case of a retail dispenser, such license fee as may be levied by the county in which his place of business is located, and shall be paid to the Board."

and sub-section 7 of the same section contains the following provisions:

"License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied."

We likewise find the following additional provisions in the Act, *supra*, which are pertinent to the inquiry now under consideration: Section 22 begins as follows:

"No license shall be issued to any manufacturer, distributor, wholesaler, or retail dispenser until the licensee shall have first paid an annual license fee for such grant, as follows:

Then follows the various licenses levied on the various classes of business with the provisions of Sub-section 3 and Sub-section 7, above quoted, appearing. Sub-paragraph 1 of Sub-section (c) of Section 21 of the Act provides, in part, as follows:

"Any retail dispenser may be granted licenses to maintain, operate or conduct any number of places for the sale of malt or brewed beverages; but the fees for such licenses shall be graduated upon a basis of 33 1/3 for each license above the cost of the last preceding license."

It will be noted that it is very obvious that the 33 1/3 appearing in the provisions of the Act last hereinabove quoted obviously means 33 1/3%, the per cent being left off through oversight, and it should be considered and read as though it is 33 1/3%. The courts of this State have sanctioned license or privilege taxes levied by counties pursuant to the authority granted to them by the Legislature, which said license or privilege taxes were computed on a basis of a certain amount on each unit of the article sold, for the selling of which the license or privilege tax is levied, such as a license or privilege tax for the selling or storing of gasoline, the license or privilege tax to be computed on the basis of a certain amount on each gallon of gasoline sold or stored by the licensee. See **Standard Oil Company vs. Limestone County**, 124 So. 523. So, since the county governing bodies are granted the authority, as pointed out above, to levy a license on retail dispensers of malt beverages, and no limit is placed on the amount of the license which they may levy, a license to be computed on the basis of a certain amount on each bottle or can of such beverage to be sold by the licensee would be valid were it not for other provisions of the Alabama Beverage Control Act which indicate that it was not the intention of the Legislature to grant counties the authority to levy a license.

It has been pointed out above that the Act provides that the license levied by the county on retail dispensers of malt or brewed beverages must be paid by the applicant for such a license before the license may be issued to him

by the Alabama Alcoholic Beverage Control Board. This provision of Section 22, supra, provides that no license shall be issued until the licensee shall have **first paid an annual license for such grant**. If the license levied by the county was to be computed on the basis of a certain amount on each bottle or can of such beverages to be sold by the licensee, it would be impossible to ascertain the amount of the license prior to the time the same was issued and it would be impossible for the provisions of Section 22 in this regard to be complied with.

Likewise, it would be impossible to ascertain, as must be done by the provision of Sub-paragraph 1 of Sub-section (c) of Section 21, above quoted, what the cost of each preceding license to be issued to a retail dispenser who wanted to operate or conduct a number of places of business would be, so that the cost of each such license could be graduated upon a basis of 33 1/3% above the cost of the last preceding license.

It is my opinion that the provisions of the Act hereinabove quoted and discussed show a clear intention on the part of the Legislature to require that the license levied by county governing bodies on retail dispensers of malt or brewed beverages be on such a basis as the amount thereof could be definitely determined in advance of the issuance of the license by the Alabama Alcoholic Beverage Control Board. That the intention of the Legislature in enacting a law is the law itself, is too well-known to require citations of authority.

Therefore, the County Commission of Jefferson County is without authority of law to levy a license or privilege tax on retail dispensers of malt or brewed beverages to be computed on the basis of 1/2c on each bottle or can of such beverages to be sold by the licensee.

Likewise, for the same reasons, the County Commission of Jefferson County is without authority to levy such a license to be computed on the basis of 1/4c on each bottle or can of such beverage to be sold by the licensee.

Since you advance the theory in your letter that a license to be computed on the basis of 1/4c on each bottle or can of such beverages to be sold by the licensee might be sustained under the authority of Sub-section (b) of Section 350 of the 1935 Revenue Act, it might be advisable to here state that in my opinion that Section of the 1935 Revenue Act is no authority for the levying of a license to be computed on the basis of 1/4c per bottle, merely because of the fact that the Beverage Control Act places a State tax of 1/2c per bottle or can on each bottle or can of such beverages sold in this State. The 1/2c tax levied by the Alabama Beverage Control Act on each bottle or can of malt or brewed beverages is an excise tax and not a license for the privilege of selling the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1937.

Honorable R. J. Westbrook,
Clerk of the Circuit Court,
Marengo County,
Linden, Alabama.

1. Trial tax is collected in the Circuit Courts of Alabama according to an opinion of this office, 1932-34, page 390.

2. As to the proper charging of stenographer's fees in cases, this should be done according to an opinion of this office written June 3, 1931, Biennial Report of the Attorney General, 1930-1932, page 316.

3. As to what papers you are entitled to collect from making copies etc. as to interrogatories, this is regulated by Section 6724, Code of Alabama, 1923.

4. As to what papers are placed or go into the final record, this is regulated by Section 6724, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 20, 1937, in which you request my opinion as follows:

"1. Is a trial tax civil and criminal cases properly chargeable in every case upon final disposition thereof.

"2. Is court reporter or stenographer's fee properly chargeable in all cases, civil and criminal, upon final disposition thereof.

"3. May I claim a fee for copying interrogatories in final records if they are not propounded according to Section 7764 of Article 10 of the Code of Alabama for 1923.

"4. Should every paper filed when a suit is in Court be placed on final records and charged for when the final disposition of a case, civil or criminal, has been made."

In answering your first request, I call your attention to an opinion of this office written to Honorable J. H. Hard, Jr., Comptroller, Biennial Report of Attorney General, 1932-34, page 390. This opinion answers this request.

Answering your second request, I call your attention to an opinion of this office written June 10, 1931, to Honorable E. L. McConnell, Clerk, Circuit Court, Lauderdale County, Biennial Report of Attorney General, 1930-1932, page 316. This answers your request.

Answering your third request, I call your attention to Section 6724, Code of Alabama, 1923, subsection 11, which is as follows:

"Subsection 11. To keep and file the books and dockets and papers in relation to, and the records of all suits which have been determined in the county court, and deposited with them, as they are required to keep and file the books, dockets, papers, and records of suits in the circuit court; and to issue all writs of execution, scire facias, writs of error, or other process on the judgments of such court, returnable as if such suits had been determined in the circuit court."

I do not know just what you have in mind where you say "not propounded according to Section 7764 of Article 10 of the Code of Alabama for 1923." But the above Section which I quote should guide you in this matter.

Answering your fourth request, I again cite you to Section 6724, supra, which, when followed will give you the information desired. There are some papers or documents that do not have to go into the final record. But, not knowing just what might arise in the trial of any case from which the final record was made up, I cannot designate item by item what should go into it. My advice to you in this matter is to follow strictly the statute.

Yours very truly,
A. A. CARMICHAEL,

Attorney General.

May 8, 1937.

Hon. C. M. A. Rogers, Senator,
33rd District, Mobile County,
Mobile, Alabama.

Taxation—Chichester Tax Act No. 126.

1. Gross receipts from sales made to National Banks exempt from payment of tax imposed by Act, supra, section 4 (b).
2. Gross receipts of sales made to incorporated cities and towns of Alabama exempt from tax imposed by Chichester Act, supra. Section 2 (f).
3. Gross receipts derived from sales to any person, association, or group for resale as lunches to school children in school building within the State, when the lunches are not sold for profit, are exempt from payment of tax imposed by the Act, supra.
4. Gross receipts derived from sales of materials to shipbuilding and repairing plants for construction, repair, towage or pilotage of vessels or barges are exempt from tax imposed by the Chichester Act, supra. See last line in Section 4 of the Act.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Mr. Chamberlain and I have been requested to ask for your opinion on the following problems created by the enactment of House Bill 179 'Alabama Luxury Tax Act';

"(1) Section 4 of that Act exempts from the provisions of the Act National Banking Association. The question that has been presented us is whether or not National Banks must pay the tax on articles purchased by them from merchants in the retail business. For example, if a National Bank in Mobile purchases a desk or typewriter, or any other supplies, is the bank subject to the luxury tax imposed by the Act. It has been suggested to us that National Banks are instrumentalities of the Government. In this connection see

Easton vs. Iowa, 188 U. S. 220 and Plymouth National Bank vs. State of Vermont, 231 U. S. 120.

This is a matter in which all of the National Banking Institutions of the State of Alabama are vitally interested, and your early attention to the matter is urged.

"(2) Are purchases made by Counties and Municipalities subject to the tax. This morning one of the leading drug concerns advises us that the City Hospital has made a purchase of medicines and other supplies. The City Hospital is a charitable institution operated by the City of Mobile, with the co-operation of the County. Must the City Hospital pay the tax? Must the City and County pay the tax on their purchases outside of those for charitable institutions?

"Our attention has been directed also to the fact that Subdivision (j) of Section 4 exempts lunches sold school children in school buildings from taxation. If supplies are sold school cafeterias which would ordinarily be subject to taxation, must the school cafeterias pay the retail merchant the tax? If this be true, then the provision in Subdivision (j) of Section IV exempting school children from the payment of the tax is senseless, because the cafeteria must of necessity pass the tax on to the children, as these cafeterias are never operated for profit.

"(3) The closing sentence in Section 4 of the Act relating to exemptions reads:

"'Amounts received by any person, firm or corporation from the construction, repair, towage or pilotage of vessels or barges.'

"While shipyards are not required to impose the tax, it is not clear whether shipyards must pay the tax on materials sold them in the State of Alabama for shipbuilding or ship repairing. Will you please give your opinion as to whether goods sold shipbuilding and repairing plants are exempt? If they are not, then this exemption is practically meaningless, inasmuch as the companies will have to include the tax they pay in the building or repairing cost."

It is my opinion that National Banking Associations are exempt from payment of the tax imposed by the Chichester Act. Section 4(b) specifically grants this exemption. Since National Banks are exempt from payment of the tax, gross receipts derived from sales to National Banking Associations are likewise exempt from the tax.

It is further my opinion that incorporated cities and towns in Alabama are not required to pay any tax imposed by the Chichester Act. Section 2 (f)

provides: "There shall also be excepted from the gross receipts of sales so as not to be taxed so much thereof as is derived from sales of merchandise and commodities to incorporated cities and towns and the State of Alabama, where such merchandise and commodities are purchased for lawful municipal or state purposes." This exemption extends to purchases made by the city of Mobile for the use and benefit of charitable hospitals operated by the City of Mobile with the cooperation of the County.

This office is now considering the liability of the county for payment of the tax imposed by the Chichester Act, but as yet no opinion has been released. I will therefore defer until a later date an opinion in response to your question as to the liability of the County of Mobile for the tax.

It is my opinion that gross receipts derived from sales of commodities or merchandise to any person, association or group by them to be resold, without profit, as lunches to school children in school buildings within the State, are not liable for tax imposed by the Chichester Act.

Section 4 (j) grants exemption to "amounts received from sales of lunches to school children in school building within the State, sold by any person, association or group not for profit." The purpose and intention of the legislature incorporating such an exemption was to relieve school children of the tax burden imposed by the Act. If the specific exemption above quoted is to have a field of operation and if the intention of the legislature is to receive recognition, the exemption from tax must of necessity extend to gross receipts derived from sales of commodities or merchandise to any person, association, or group and by them to be resold as lunches to school children in school buildings within the State, provided, of course, the lunches are not sold for profit. I therefore hold that the gross receipts derived from such sales are exempt.

Answering your inquiry as to the liability of shipyards, for payment of the tax, it is my opinion that Section 4 (l) specifically exempts them from the payment of tax on materials used in the construction, repairing, towage or pilotage of vessels or barges. This exemption likewise extends to gross receipts derived from the sales of materials to such shipyards and by them to be used in the construction, repairing, towage or pilotage of vessels or barges. It was evidently the intention of the legislature not to burden shipyards with the tax imposed by the Chichester Act, and if such was the intent, full and complete relief can only be granted by extending the exemption to sales of such materials to the shipyards. To hold otherwise, would be to defeat the intention of the legislature.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Probate Judge and Chairman of Court of County Commissioners
not entitled to compensation for keeping records under Section 8½
of County Financial Control Act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 12, 1937, in which you request my opinion as follows:

"Can a Probate Judge, Chairman of the Court of County Commissioners or the President of the Board of Revenue draw compensation under Section 8½, page 806, Acts of 1935 for keeping the records provided for in Section 8, page 805, Acts of 1935?"

In my opinion, the officers named in your letter may not draw compensation provided in Section 8½ of Act 379, Acts of 1935, known as the Financial Control Act. This Section reads as follows:

"Section 8½.—WHO SHALL KEEP RECORD. The record provided for in the next preceding section shall be kept under direction of the Judge of Probate, or the Chairman of the Board, whose duty it shall be to keep this record up to date at all times, and to perform any other duties with reference to accountability, auditing claims, issuing warrants, and supplying such Board with information, as they may deem necessary for the administration of the financial affairs of the County; provided that the Board of Revenue, Court of County Commissioners, or other governing body shall provide for the payment of reasonable compensation for the work of keeping this record."

You will note that under the first sentence of said Section it is required that the record shall be kept "**under direction** of the Judge of Probate or the Chairman of the Board". In my opinion this is incompatible with the actual keeping of the record by the Judge of Probate or the Chairman of the Board. The compensation provided under the last Section of the Act, is for the actual work of keeping the record and, in my opinion, the Judge of Probate or the Chairman of the Board is not entitled to compensation for supervising the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. J. M. Lyon, President,
Board of Revenue, Shelby County,
Columbiana, Alabama.

County Board of Revenue has discretion to close and sell alms house.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your recent inquiry in which you ask my opinion as follows:

"Please give us your opinion on the following:

"The Board of Revenue of Shelby County is contemplating closing its Alms House and turning its inmates over to the Department of Public Welfare. Shelby County is over its constitutional debt limit at the present time. Can Shelby County close its Alms House and make an appropriation to the Department of Public Welfare to care for the poor and paupers of this County?"

In my opinion, your question should be answered in the affirmative. Under the provisions of Code Section 2787 the Court of County Commissioners or Board of Revenue may purchase or at their discretion may sell County Poor House. The court may in its discretion make such appropriation and orders necessary for the regulation and government of the poor. Under Section 231 (5) of the Code, claims for the poor are preferred claims against the County. If in your discretion the poor of Shelby County may be better cared for by closing its Alms House and turning the inmates over to the Department of Public Welfare, in my opinion you are authorized to do so without regard to constitutional debt limit. I call your attention to the provisions of the Luxury Tax Act, Section 21, providing that the respective counties' portions of the proceeds of the Luxury Tax shall be used for public health, public welfare, and extension service. I also call your attention to the opinion of this office dated February 20, 1936, Vol. 2, Quarterly Report 182, at page 186.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 8, 1937

Hon. Hamp Draper,
Associate Member,
Board of Administration,
CAPITOL.

Partial payments of court costs prior to conviction when defendant is subsequently sentenced to hard labor for non-payment of costs allowed.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"RE: Partial payments of court costs prior to conviction when defendant is subsequently sentenced to hard labor for nonpayment of costs.

"Your opinion is requested on the above subject which is taken from case No. 6057, Henry Edwards, Chilton County.

"As represented to this department by the Clerk of the Circuit Court, the defendant paid the Clerk \$13.00 before sentence was passed and requested that it be applied to the Solicitor's fee which was \$10.00 and the Trial Tax which was \$3.00. At a subsequent date Edwards was sentenced to hard labor for non-payment of the costs.

"The Clerk in rendering this department a transcript of the minutes deducted from the costs the amount paid to him and showed the sentence for costs only for that part of costs unpaid.

"We are of the opinion that the Clerk is without authority in accepting such payment in part unless same was held pending the disposition of the case. We further believe that if the defendant is subsequently sentenced to hard labor for non-payment of the costs he would be sentenced for the entire amount accrued and that part of the costs collected would be sent together with the transcript to the Convict Department when convicted where proper credit would be given the defendant."

In my opinion, the clerk has authority to accept partial payment of costs. However, neither the clerk nor the defendant may specify the particular items of the costs to which such payments should be applied. The clerk should forward that part of the costs collected, together with the transcript, to the Convict Department, where proper application of the payment should be made.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. J. P. McKee,
Chairman, Court of County Commissioners,
Washington County,
Chatom, Alabama.

May 8, 1937

Stock law election — County governing body must call election in a particular precinct when a petition meeting the requirements

of Section 10208 has been presented to them requesting an election in that precinct, for the purpose of determining whether or not all stocks, including hogs and goats, shall be prohibited from running at large in said precinct, even though there is already in effect in the county of which the precinct is a part a county-wide partial stock law prohibiting the running at large of hogs and goats only.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have the letter signed by all Members of the Commissioners Court of your county which reads as follows:

"We are writing you requesting that you give a ruling upon the following proposition:

"On this date there has been presented to us a petition as follows:

"State of Alabama,
Washington County,

February 1, 1937.

To the Court of County Commissioners of said County:

We, the undersigned citizens and landowners and bona fide freeholders of Sunflower Precinct No. 15 of said County, do hereby petition the Court of County Commissioners of Washington County, Alabama and state that they desire an election in Sunflower Precinct No. 15, of said County and State to ascertain whether or not a majority of the qualified electors of said precinct desire or favor a law prohibiting the running at large of stock, hogs and goats, in Sunflower Precinct No. 15, Washington County, Alabama.

Respectfully submitted.

Signed by 145 names.

"Some years ago this County held a hog and goat election and a law prohibiting their running at large was declared carried. Since which time the County has been operating under a County wide law prohibiting the running at large of hogs and goats.

"The contention of the present petitioners is that granting that the county wide hog and goat law is valid, still Section 10222 of the Code does not apply as they claim that is only a partial stock law. There is no contention by any one that there is any county wide, or even Precinct wide, cattle and sheep law, or any other stock except hogs and goats prohibited by law from running at large.

"Petitioners further contend that the above petition meets the requirements of Section 10208 and is for the purpose of determining

whether any stock, including hogs and goats, cattle and sheep or otherwise, shall be prohibited from running at large in that Precinct.

"We would appreciate your giving us a ruling as to what is our duty in respect to this petition. Petitioners offer to put up enough money to cover the costs of an election to be held in that Precinct. And it is admitted that they have, or will meet any requirement for the calling of an election under Section 10208 of the Code."

It is my opinion that your Court of County Commissioners must, upon the presentation to you of a petition which meets all of the requirements of Section 10208, hold an election, in accordance with the provisions of that section, in the precinct in which the petition calls for an election, for the purpose of determining whether or not the majority of the qualified electors of that precinct desire a law prohibiting the running at large of all stocks; notwithstanding the fact that your county of which this precinct is a part has a county-wide partial stock law which prohibits the running at large of hogs and goats in the entire county.

A partial stock law which prohibits the running at large of only certain kinds of stock is valid. See **Yates vs. Walker County Commission**, 230 Ala. 361. Notwithstanding the fact that you have such a county-wide partial stock law, however you must hold an election in a particular precinct, when you are requested to do so by proper petition, for the purpose of letting the electors of that precinct determine whether or not they desire a law in said precinct prohibiting the running at large of all stocks, including hogs and goats. If such an election were to result in a majority of the electors voting in favor of a stock law prohibiting the running at large of all stocks, it would in no wise repeal the partial county-wide stock law which you now have prohibiting the running at large only of hogs and goats, which unquestionably could only be repealed in an election held in the manner provided by Section 10222 of the Code and not in the manner provided by Section 10208 thereof. It would merely add to the provisions of the county-wide partial stock law which you now have prohibiting the running at large of hogs and goats so far as that particular precinct is concerned.

If the election resulted in a majority of the qualified electors in that precinct voting against a stock law prohibiting the running at large of all stocks including hogs and goats, the results of said election would not change the county-wide partial stock law which you now have prohibiting the running at large of hogs and goats in said precinct. It would still remain in full force and effect.

The case of **Watson vs. County Commission of Walker County**, 230 Ala. 365, is direct authority for such a holding.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 10, 1937

Hon. H. J. Brogden,
Probate Judge,
Covington County,
Andalusia, Alabama.

Operator of rolling store is required to pay state license in every county in which he does business. Act No. 230, Special Session of the Legislature, 1936-1937.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which is set forth in an opinion of this office dated March 16, 1937. I again quote the letter as follows:

"Mr. Harry Simon with the State Tax Commission wrote me that he had asked your department for an opinion as to whether or not a rolling store, under the present revenue law, is required to pay a state and county license in each county in which they operate?

"I will thank you to let him have that opinion as soon as convenient to you as I am very much interested in it as I have one or two rolling stores from Butler and Coffee wanting to pay just county license over here and I don't know whether to accept same or not."

The opinion of this office dated March 16, 1937, addressed to you, is hereby supplemented with this opinion.

At the time the opinion of March 16, 1937, was prepared, there had been no change in the schedule 146, General Revenue Acts of Alabama, 1935, but at the time the opinion was released on March 16, 1937, the legislature of Alabama had amended Section 146, supra. This amendment is reflected in Act No. 230 and was approved March 2, 1937. The opinion of March 16, 1937, was correct at the time it was prepared, but at the time it was released the legislature had amended the schedule. When the opinion was released March 16, 1937, the Acts of the Legislature had not been printed and had not been delivered to this office. The printed Acts were recently delivered to this office and only after this delivery did we ascertain that the law had been changed.

Therefore, it becomes my duty to supplement my former opinion so that you may be informed of the amendment and of the change in the license to be charged.

Act No. 230, Special Session of the Legislature, 1936-1937, amended subsection c of Schedule 146 of Section 348, Revenue Acts of Alabama, 1935, to read as follows:

"(c) Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this Schedule displaying, selling or offering to sell any goods, wares or merchandise of whatever nature, at

retail shall pay to the State in order to engage in such business the following licenses: Upon one (1) motor vehicle, the annual license for each such motor vehicle, not in excess of one, so used, of—\$100.00 . Upon two motor vehicles, or more, but not to exceed three, the annual license fee for each such additional motor vehicles shall be—\$130.00. Upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be—\$150.00. Upon each motor vehicle in excess of six, for each such additional motor vehicle \$200.00. **In addition to the above, there is levied a license of—\$50.00 for the state and a county license of \$50.00 in each additional county in which said business is conducted.** Rolling stores which are controlled or held with others by stock ownership of 25 per cent or ultimately controlled or directed by one management or association of ultimate management, shall be deemed for the purpose of this Schedule as being owned by the same person." (Emphasis is ours).

Subsection (c) supra, requires a rolling store operator, in my judgment, to pay in addition to the regular license, the sum of \$50.00 State license in each additional county where he does business. You will therefore observe this additional charge made for a state license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 10, 1937

Hon. R. L. Holcombe, Sr.,
Sheriff, Mobile County,
Mobile, Alabama.

Alabama Luxury Tax Act—Food bought by Sheriff pursuant to Section 4827, Code of Alabama, 1923, for which he is reimbursed by the State, and served to state prisoners is exempt from taxes imposed by the Alabama Luxury Tax Act.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry which I quote as follows:

"Please advise me as to the effect of the Sales Tax under House Bill No. 179, approved February 23rd, 1937, on food-stuffs purchased for prisoners placed in the Mobile County Jail, as to whether a Sales Tax can be collected on same or not.

"Section Two, Subsection (f) provides:

'and there shall also be excepted from the gross receipt of sales so as not to be taxed so much thereof as is derived from the sale of

merchandise and commodities to incorporate cities and towns of the State of Alabama where such merchandise and commodities are purchased for a lawful, municipal, or state purpose,—.

"I am referring you not only to the Sales Tax Act, but also to the Act fixing the Sheriff's allowance for preparing food for prisoners on page 595 of the General Acts of Alabama of 1935, Regular Session. Section One of the last named Act provides as follows:

'Section 1. That the Sheriffs of the several counties of the State shall receive pay for services in preparing food, serving food and other services incident to the feeding of prisoners, not including the cost of food to be served to such prisoners, as follows: For 1 prisoner \$1.00 per prisoner per day; For each prisoner from 2 to 5 prisoners 50c per prisoner per day; For each prisoner from 6 to 10 prisoners 40c per prisoner per day; For each prisoner from 11 to 20 prisoners 30c per prisoner per day; For each prisoner from 21 to 85 prisoners .05 per prisoner per day.'

"You understand that food is purchased for these prisoners by the Sheriff and whatever amount is charged for same including the tax must necessarily be charged back to the State. There are no more county prisoners, all are taken over by the State."

It is my opinion that all food which the Sheriff buys pursuant to Section 4827, Code of Alabama, 1923, and for which he is entitled to reimbursement out of State funds, in accordance with this Section, is exempt from tax imposed by the Alabama Luxury Tax Act.

Section 2 (f) of the Alabama Luxury Tax Act provides in part that: "there shall also be excepted from the gross receipt of sales so as not to be taxed so much thereof as is derived from sales of merchandise and commodities to incorporated cities and towns and the State of Alabama where such merchandise and commodities are purchased for Lawful municipal or state purposes."

So far as the exemption from payment of the tax imposed by the Alabama Luxury Tax Act, the Sheriff of the several counties in making of purchases of food pursuant to Section 4827, supra, and for which he is reimbursed by the State, is acting as a purchasing agent for the State of Alabama and is bound by the limitations of said Section. The Act specifically exempts the State of Alabama from payment of the tax which exemption includes the tax on any purchases of food made by the Sheriff for State prisoners.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 12, 1937

Hon. John P. Kohn,
Associate Member,
State Tax Commission,
CAPITOL.

Interstate Commerce—Foreign corporation engaged exclusively in interstate commerce does not have to qualify in Alabama under Section 309 of the 1935 Revenue Act, as a condition precedent to carrying on that business.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of March 4, 1937, in which you state:

"The Atlantic & Gulf Coast Air Line, Inc., a Florida corporation, will establish an air line for the transportation of passengers, freight and mail between Mobile and points in Florida and Georgia. The air line will transport no persons, freight or mail in intrastate commerce, but will transport passengers and freight solely in interstate commerce. The corporation will rent office space at the municipal airport and will rent space in the hangar for its ship when receiving and discharging passengers and freight. Tickets will be sold at said office by an agent of the company for transportation in interstate commerce and a mechanic will be employed to service the planes in furtherance of the transportation of passengers in interstate commerce."

You request my opinion as follows:

Will it be necessary for the above mentioned Florida corporation to qualify as a foreign corporation in compliance with Section 309 of the 1935 Revenue Act?

It is my opinion from the facts, as stated in your letter that the Atlantic & Gulf Coast Air line, Inc., will be engaged exclusively in interstate commerce, and will not have to qualify as a foreign corporation under Section 309 of the 1935 Revenue Act, as a condition precedent to carrying on that business.

In the case of *Simpson v. Shepard*, 230 U. S. p. 35, the Supreme Court of the United States said:

"That the commerce clause of the Constitution (article 1, Section 8, cl. 3) has conferred upon Congress full power to regulate interstate commerce is all but elementary, and any attempt by a state to interfere with such exclusive regulation has been held unconstitutional and void.

"The general principles governing the exercise of state authority when interstate commerce is affected are well established."

"The power of Congress to regulate commerce among the several states is supreme and plenary. It is "complete in itself, may be exercised

to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. Ed. 23. * * *

In the case of *Western Union v. Kansas*, 216 U. S. 1, the Court said:

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation,—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steamship Co. v. Tinker*, 94 U. S. 238—Citing *Telegraph Co. v. Texas*, 105 U. S. 460; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 211; *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 342; *McCall v. California*, 136 U. S. 104, 110; *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114, 118.

"On the contrary, it is to be deducted from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, **on account** of such business."

In the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. p. 196, the following facts appear: The ferry company was incorporated under the laws of New Jersey and maintained a ferry from Gloucester, N. J., to Philadelphia, Pa. It leased a ship or dock in Pennsylvania for the distribution and receiving of passengers and freight. Pennsylvania attempted to levy a tax on the capital stock of the corporation, contending that it was doing business within the State. The Court held that such tax could not be levied and said:

"The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of inter-State commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

In the case of *Haynes v. Pacific Mail Co.*, 17 How. 596, a New York Corporation owned steam vessels for the transportation of passengers and freight between New York, San Francisco and Oregon. An agency was maintained in San Francisco and a shipyard at Benicia in California for furnishing and repairing its steamers. The Supreme Court held that these vessels were not subject to taxation in California as they were only temporarily there while not engaged in lawful trade and commerce.

In the case of *Texas Transport & Terminal Company, Inc., v. City of New Orleans*, 264 U. S. 150, the following facts appear: The City of New

Orleans filed suit in a Louisiana state court to recover from defendant a license tax of \$400, imposed, for the year 1922, upon its business of steamship agent. The demand was resisted on the ground that the tax was in contravention of the Commerce Clause of the Constitution of the United States in that it was an interference with and tax upon interstate and foreign commerce. Defendant was regularly employed as agent for four steamship lines, under a contract fixing its compensation on the basis of commissions, calculated upon the gross amount of freight charges collected by it for each company. In addition, defendant occasionally represented other ship owners. All were exclusively engaged in interstate or foreign commerce and defendant's business was confined solely to representing principals so engaged in such commerce. The service rendered consisted of soliciting and engaging cargo, nominating ships for carrying it, arranging for its delivery on the wharf, issuing bills of lading under the name of ship owner or charterer, arranging for stevedores for loading and discharging cargo, collecting freight charges, paying ships' disbursements, attending to immigration service and assisting generally in matters of local customers and regulations. Freight moneys collected, after deducting commissions, were remitted to the owners or charterers. As such agent, defendant was authorized to solicit cargo and quote freight rates and to issue receipts in the name of its principal for cargo delivered on the wharf.

The Court said:

"This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the State prior to their introduction therein, *Stockard v. Morgan*, 185 U. S. 27 ;or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. *McCall v. California*, 136 U. S. 104. The latter decision controls the present case. There the agent of a railroad company was engaged in San Francisco in the business of soliciting and inducing persons to travel from the State of California into and through other States to New York City, over the line of railroad which he represented. It was held that the business of the agent constituted a method of securing passenger traffic for the company, and therefore the tax was one 'upon a means or an occupation of carrying on interstate commerce, pure and simple.' The only difference between that case and this is that there the agent was engaged in seeking interstate passenger business, while here the agent was engaged in seeking interstate and foreign freight business. Plainly as pointed out in the *McCall Case*, the principle is the same."

In the case of *Ozark Pipe Line v. Monier*, 266 U. S. p. 555, the Supreme Court of the United States in holding that the State of Missouri could not collect a franchise tax from a foreign corporation whose business in the State consisted exclusively in the operation of a pipe line for transporting petroleum, through the State in interstate commerce, and in ownership of property, maintenance of its principal office, purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and other acts within the State, all exclusively for the furtherance of such interstate commerce, and constituting the means and instruments by which it was conducted said:

"If the business taxed is in fact separate local business, not so connected with interstate commerce as to render the tax a burden upon such commerce, the tax is good. An illustration of such a tax is found in *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, where this Court upheld a state franchise tax upon a cab service maintained wholly within the State of New York by the railroad company to convey passengers to and from its terminus in New York City, for which service the charges were separate from other transportation charges. The principle announced was: 'Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation. *Osborne v. Florida*, 164 U. S. 650; *Pullman Co. v. Adams*, 189 U. S. 420.' On the other hand, in *Norfolk, etc. R. R. Co. v. Pennsylvania*, 136 U. S. 114, 120, a Pennsylvania tax of similar character sought to be imposed upon a Virginia railroad corporation was held bad. The railroad company maintained an officer in Pennsylvania for the use of its officers, stockholders, agents and employees and expended large sums of money in that State in the purchase of materials and supplies for its railroad. It owned a small amount of property in the State. In holding that the tax contravened the commerce clause the Court said:

"Was the tax assessed against the company for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employees, a tax upon the business of the company? In other words, was such tax a tax upon any of the means or instruments by which the company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. * * * Again, the plaintiff in error does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the secretary of the Commonwealth the certificate required by the act of the State legislature of 1874 enabling it to maintain an office in the State. That office was maintained because of the necessities of the Interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means of instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States.'

* * * * *

"The business actually carried on by the appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

The premises considered, it is therefore my opinion that the Atlantic & Gulf Coast Air Line, Inc., a Florida corporation will be engaged exclusively

in interstate commerce. The maintenance of an office at the airport in Mobile, hiring mechanics to service the planes and selling tickets by agents of the corporation, will all be in furtherance of its interstate business. The acts enumerated will be merely incidental to carrying on an interstate transportation service.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 12, 1937

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer, Alabama.

Taxation—Ad Valorem exemptions to deaf mute—Revenue Act, 1935, Articles I, Section 2 (f).

2. Deaf mute entitled to ad valorem tax exemption, *supra*, of real estate to the extent of his assessable interest but not to exceed the exemption limit.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of April 22, 1937, which is as follows:

"I wish an official opinion on the following case. There are two mutes, husband and wife, assessing jointly a house and lot and they claim they are entitled to an exemption of \$2000.00 each or net \$1200.00 each. Should they be allowed jointly \$1200.00 or \$2400.00?"

It is my opinion that each of the deaf mutes is entitled to ad valorem tax exemption, *supra*, of real estate to the extent of his or her assessable interest, but not to exceed the exemption limit. Joint occupancy of the property would not defeat the exemption provided by law if each deaf mute has an assessable interest in the property. The assessable interest may be joint or separate.

If title to the property is in one of the deaf mutes, then the assessment should be made to the title holder. Joint occupancy of the property without more would not authorize a joint assessment of the property for the purpose of obtaining joint exemptions.

However, if each of the deaf mutes owns bona fide an assessable interest in the property, then each is entitled to his or her exemption, not to exceed an assessed valuation of \$1200.00 for each interest. I can find nothing in the exemption statutes which defeats an exemption of real property in which claimants own a joint assessable interest. Quarterly Report of the Attorney General, Vol. 6, page 130 (March 16, 1937.)

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 13, 1937

Hon. Q. D. Taylor, Sheriff,
Marshall County,
Guntersville, Alabama.

1. The Chief Deputy Sheriff of Marshall County is appointed by the Sheriff and serves at his will, therefore, such Chief Deputy has no fixed term of office and his salary may be reduced or increased within the limits fixed by Section 10188, Code of Alabama, 1923.

2. The Jail guard of the County of Marshall is also appointed by the Sheriff and serves at his will, therefore, has no fixed term of office and his salary may be reduced or increased at any time the Board of Revenue of his County may see fit.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 23, 1936 in which you request my opinion as follows:

"I hand you herewith a certificate signed by the Chairman of the Board of Revenue which correctly states the facts as shown from Minutes of the Board of Revenue.

"I appointed Mr. E. M. Boyles Chief Deputy Sheriff of this County at a salary of \$125.00 per month. At that time the County was paying and had been since 1927, a monthly salary to the Chief Deputy of \$125.00 per month. No change had been made decreasing this amount. I appointed him for a four-year term to the duration of my tenure in office. They continued to pay this salary until the first day of November, 1935, at which time the Board of Revenue created by Special Act of the Legislature of 1935 in fixing the budget for the County allowed in the budget only \$75.00 and by this means attempted to cut his salary for \$125.00 to \$75.00 per month. Special Acts of the Legislature, 1936 created a new Board of Revenue. The new Board of Revenue restored by Resolution his salary to \$125.00 per month, which they have been paying from May 1st, and did by Minute Entry agree to pay back salaries in case they could legally do so.

"QUESTION: Can this back salary of six months be legally paid to Mr. Boyles under this state of facts, and the state of facts set forth in this Certificate of the Chairman of the Board of Revenue?

"For your further information, I talked to the Chairman of the Board of Revenue, Judge Williams, Probate Judge of Marshall County, and he told me to appoint Mr. Boyles at a salary of \$125.00 per month and I did so under that agreement at that time, and he was paid for nine months of his salary at that rate before they attempted to cut it. In that same conversation I had an agreement with the Probate Judge, who is Chairman of the Board of Revenue now and was then, that the salary of the Jail Guard would be \$75.00 per month, for the term of my office, and I appointed Mr. W. P. King, Jailer.

"The minutes of the Board of Revenue record this part of the agreement, as shown by the enclosed Certificate from the Chairman. He was paid the \$75.00 per month until November 1st, when the Board of Revenue in fixing a budget under the Lee bill allowed in the budget only \$50.00 per month for his services. He was then paid \$50.00 per month until May 1st, when his salary was then restored to him under the agreement shown by the Minutes if they could legally do so they would pay the back six months' of \$25.00 per month.

"All payments made to Mr. Boyles and Mr. King were accepted under protest and claims filed with the Board of Revenue each month for the full amount of their original salaries, and they were accepted under an agreement with the Board of Revenue and Mr. King and Mr. Boyles, that it was to be accepted without prejudice on their part, and without prejudice on the part of the Board of Revenue.

"QUESTION: Can these payments now be legally made to Mr. King for the back six months, in which he was only paid \$50.00 per month instead of \$75.00 as claimed to be due by him?"

Answering your request, I call your attention to Section 10188, Code of Alabama, 1923, which is as follows:

"10188. DEPUTIES.—In all counties of the State of Alabama which now have not more than two hundred thousand inhabitants according to the last federal census or which may hereafter have such population according to any federal census hereafter taken, in which the sheriff is not a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board of revenue or other governing body of the county in which such chief deputy is appointed not less than nine hundred and not more than fifteen hundred dollars, payable upon the warrant of the board of revenue or court of county commissioners of such county."

You will note from the above section that power to fix the salary of such chief deputy is lodged in the commissioner's court, Board of Revenue, or other like governing body of your county. The power of appointment of such deputy is lodged in the sheriff and the statute supra says: "Such deputy serves at the will of the sheriff." This being true such deputy has no fixed term of office. *Touat vs. State ex rel, Callaghan*, 173 Ala. 453; *Cooper v. State ex rel, Hawkins*, 226 Ala. 283; *Roberts v. State ex rel, Bailey et al*, 228 Ala. 222; 99 A. L. R. p. 381 (Note).

I note you say you appointed Mr. Boyles, Chief Deputy for a term of four years and at the time the Board of Revenue of your County, fixed his salary at \$125.00 per month and he was paid this amount up to November 1, 1935, at which time the Board of Revenue reduced his salary, fixing it at \$75.00 per month; that this deputy drew this salary up to May 1, 1936, at which time the Board of Revenue placed his salary back to \$125.00 and offered to pay the difference between \$125.00 per month and \$75.00 per month from November 1, 1935, up to May 1, 1935.

You desire to know if this can be legally paid; my answer is in the negative. Even though you appointed such deputy at the beginning of your term for a term of four years could make no difference as he still served at your will and pleasure. I call your attention to 46 C. J. page 964, Section 98, which is as follows:

"98. INDEFINITE TENURE. Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no "Term" of office. A constitutional provision that terms of office not fixed by the constitution shall not exceed a specified time does not enlarge the duration of an office held at the pleasure of the executive."

Therefore, such deputy having no fixed term of office, but serving at the will of the sheriff was subject to the cut made by the Board of Revenue who was clothed with the power to fix his salary between certain limits, Section 10188 supra, but aside from all this, I think Section 63 of the Constitution of Alabama, 1901 definitely prohibits the very thing attempted to be done in this case. This section is as follows:

"The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners."

What I have said with reference to your chief deputy sheriff applies with equal force to your jail guard, Mr. W. P. King.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. J. L. Lawson,
Treasurer, Hale County,
Greensboro, Alabama.

May 14, 1937

County Treasurer not liable for losses in cases where sinking funds of the county are invested in accordance with the direction of the governing body of the county and in compliance with Section

2294 (Sub-section 61) and Section 6755, (Sub-section 22), as amended, of Michie's Code.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

This is to acknowledge receipt of your letter of recent date, which is as follows:

"I am very anxious to get an opinion from your office in regard to a matter which has come up within the past thirty days.

"The Commissioners Court of Hale County has ordered me, as County Treasurer, to invest all sinking funds in United States bonds. Before doing this, I would like to know if my bondsman or I would be liable to the County in case there was a severe break in the bonds. These bonds at this time, are worth about 105. Should there be a break, the County would lose money. I think their action is wise but I must protect myself and my bonding company and I would appreciate it if you would give me an opinion on this just as soon as possible."

Section 2294 (Sub-section 61) and Section 6755 (Sub-section 22), Michie's Code of Alabama, provides as follows:

"2294 (61). SINKING FUNDS—All sinking funds provided for the retirement of bonds shall be invested in bonds of such sub-division, or in bonds of the United States of America, or in bonds of the state of Alabama, or in bonds of any county in the state of Alabama, or any municipal corporation of the state of Alabama, or deposited in bank on interest. All sinking funds created by resolution or ordinance heretofore adopted must be properly set aside each year in accordance with the resolution or ordinance provided for the same, and a report made thereof and filed with the clerk of the municipality or with the probate judge of the county, as the case may be, showing in detail how said sinking fund is invested or deposited. All contracts now in effect for purchasing savings certificates, under the law as it heretofore existed, shall continue as legal investments."

"6755. (22) To set aside such part of the revenue of the county as may be deemed expedient for the purpose of creating a sinking fund for the payment of bonds or other indebtedness, and to invest such sinking fund in such interest-bearing securities, or deposit the same on interest-bearing account, within the state, as said court may deem wise."

I am of the opinion that if a County Treasurer invests the sinking funds of the county in accordance with the direction of the governing body of the county in United States government bonds, he is not liable for any losses which the county might incur by virtue of a break in the bond market. He has merely acted in compliance with the direction of the governing body of the county, which direction was in full compliance with the authority vested in it by the Legislature.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. Howard Kirby,
Clerk of the Circuit Court,
Etowah County,
Gadsden, Alabama.

Fine and Forfeiture Fund—ex officio Clerk of the County Court not entitled to file claims against fine and forfeiture fund for fees arising from proceedings under Section 5138, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of recent date which I quote as follows:

"Would I be entitled to file claim on Fine and Forfeiture Fund for fees in Breach of the Peace cases in County Court?"

If I may assume by your use of the words "Breach of the Peace cases" you refer to preventative proceedings instituted pursuant to the authority contained in Sec. 5138, Code of Alabama, 1923, it is my opinion your question should be answered in the negative.

A claim against the Fine and Forfeiture Fund of a County should be based upon costs accruing from the prosecution of an offense for which punishment may be inflicted and does not include a claim for costs arising from proceedings which in their nature are to restrain the commission of an offense.

Section 5138 "is a preventative measure which the magistrate is authorized to set in motion to restrain the defendant from the commission of an offense against personal property or another, and not a proceeding to try the person charged with the commission of a criminal offense." **Howard v. State**, 121 Ala. 21. 25 So. 1000. "To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, he may be restrained from so doing by proper proceeding." **Howard v. State**, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. J. S. VanValkenberg,
Chairman, Board of Commissioners,
Madison County,
Huntsville, Alabama.

Court of County Commissioners authorized to purchase land upon which to erect public buildings.

Purchase price may be provided for by issuance of interest bearing warrants payable out of 2.5 mill tax provided for in Section 215 of the Constitution of 1901.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of March 19, 1937, which is as follows:

"As Chairman of the Board of County Commissioners of Madison County, Alabama, I am directed to request of you the following opinion:

"1—Can the Board of County Commissioners of Madison County, Alabama, purchase real estate in the city of Huntsville, Alabama, for a necessary public building to house agencies of the county, such as the County Health Officer and his assistants, and the County Farm and Home Demonstration Agencies, for which there is not room in the present court house or public buildings of said county, and for which the county is now paying rent for offices or quarters outside of the court house or public buildings owned by the county?

"2—If your answer to the foregoing question is in the affirmative, then can the Board of County Commissioners issue interest bearing warrants for the purchase of such real estate to the grantor or seller thereof; such warrants to be payable from or with the special 2.5 mills tax for buildings, bridges and roads authorized under Sec. 215 of the Constitution of Alabama?"

It is my opinion that your first inquiry should be answered in the affirmative. Sections 212-219 of the Code of Alabama, 1923, provide for the erection of public buildings. These legislative mandates cannot be carried out unless the Court of County Commissioners has the power to purchase land upon which to erect such buildings.

I am of the opinion that your second inquiry should be answered in the affirmative. Section 215 of the Constitution of 1901 is as follows:

"Sec. 215. No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected may be applied exclusively to the purposes for which the same were levied and collected."

In my judgment, the case of **Territory ex rel Overbaker et al v. Baxter**, 83 Pac. 709, is direct authority for the position here taken. The statutes of Oklahoma provided as follows:

"Whenever the Board of County Commissioners of any county in the territory of Oklahoma considers it to be to the best interest of the county to purchase or erect a courthouse or jail, they shall have power to contract for the purchase or erection of same, and to issue bonds in payment therefor."

The question was presented to the court as to whether the power to erect a courthouse or jail included the implied power to purchase a site upon which to erect a jail, and to issue bonds therefor.

The Court held:

"It seems to us that the answer to the question is obvious. The power to erect a courthouse or jail implies the incidental power to **purchase a site for each purpose**. This implied power is essential and indispensable for the purpose of carrying into effect the express power conferred by the statute. In *DeWitt v. San Francisco*, 2 Cal. 289, it was held that the authority by act of the Legislature to erect a courthouse and jail, would necessarily embrace the power to **purchase the land** on which to erect them."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

License Schedule 16 Revenue Act 1935—Operator of filling Station and garage must pay accessory license where stock exceeds value of \$75.00.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 22, 1937 in which you request my opinion as follows:

"A man operating a filling station and garage in connection with said filling station has procured license under Schedule 67 to sell gasoline and has procured license under Schedule 13 to repair automobiles has been cited by license inspector saying he is subject to a license under Sched-

ule 16 claiming that this man has in stock about \$140 worth of accessories at wholesale value. Please see Schedule 16 which exempts him from accessory license for \$75 under Schedule 67 and \$75 under Schedule 13, he having procured both of the above mentioned licenses. It seems to me that his stock of accessories would have to exceed \$150 wholesale value before he would be liable to buy license under Schedule 16. Please give me an immediate reply."

In my opinion, the person described in your letter is subject to the license under Schedule 16. This Schedule requires a license on persons selling motor vehicle accessories, tires, etc.: "Provided regularly licensed filling stations or garages are not required to pay the above accessories license if their stock of accessories at any time does not exceed the wholesale value of \$75.00."

It is well settled that licensing statutes should be construed strictly against any exemptions. The exemption is not based on so much for a garage and so much for a filling station, but is based solely on the stock of accessories not exceeding the wholesale value of \$75. Since the stock in question exceeds \$75, the exemption does not apply.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Honorable Mack Kilcrease,
County Solicitor,
Albertville, Alabama.

License taxes imposed by Act No. 252, General Acts, 1935, p. 647, does not apply to amateur athletic performances specified in sub-section (d) thereof when held under auspices of educational institutions for promotion of education in Alabama.

Opinion by the Attorney General.

Dear Sir:

Reference is made to your request for an opinion which I quote as follows:

"I would like for you to give a ruling on House Bill 197 which appears on page 647 of the 1935 Acts of the Legislature, with special reference to sub-section "D". Provided, however, that nothing in this act shall be permitted, authorizing or enjoining the commission to collect any license, permit, fee, or tax for any amateur boxing, sparring, or wrestling. Exhibitions held under the auspices of educational institutions when the proceeds of this nature are to be used to foster, aid, or effect the program of education in the State of Alabama."

"What I want to know, is our school subject to fees and license charged under this bill for amateur performances where they are held for the benefit of the education programs."

It is my opinion that the athletic performances specified in sub-section (d), Act No. 252, General Acts of 1935, p. 647, held under the auspices of your school or any other educational institution in Alabama for the promotion of educational programs in this state are not subject to the license taxes imposed by Act No. 252, supra, on like performances. An exemption from such license tax imposed by said Act is granted to educational institutions by subsection (d) of the Act provided the proceeds are used in the manner directed in said sub-section which I quote as follows:

"(d) to revoke any license or permit when, in its sound discretion, the public welfare requires it; provided, however, that nothing in this Act shall be construed as permitting, authorizing, or enjoining the Commission to collect any license, permit, fee, or tax for any amateur boxing, sparring, or wrestling matches or exhibitions held under the auspices of educational institutions when the proceeds of affairs of this nature are to be used to foster, aid, or abet programs of education in the State of Alabama. But no exemptions from license, permit, fee, tax, or charges will be granted to any person, group of persons, or organization when the proceeds or any part thereof of such amateur boxing, sparring, or wrestling matches or exhibitions are for personal or private gain. Reports of all such matches shall be made to the Boxing Commission within ten days thereafter, and upon such form and with such information as may be required by the Commission."

The exemption granted in the foregoing Act has no reference to exemption from payment of tax imposed by the Alabama Sales Tax Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 14, 1937.

Dr. J. A. Keller, Superintendent,
Department of Education,
Montgomery, Alabama.

Alabama Sales Tax—Exemptions of gross receipts derived from sales to city and county boards of education.

Gross receipts derived from sales of automobile trucks, chassis, and of bodies therefor, accessories, parts and equipment to city and county boards of education for lawful purposes are exempt.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of recent date which I quote as follows:

"Many requests are still coming to this office concerning the interpretation of the opinion rendered on April 14, 1937, in relation to the payment of the sales tax by boards of education. This opinion deals with the application of the sales tax to certain specific purchases by board of education. School boards purchase many articles not referred to in your opinion. Therefore, I am requesting your opinion concerning the following questions:

"1. Are the gross receipts derived from the sales of automobile trucks or chassis and of bodies therefor to county and city boards of education to be used lawfully in the transportation of children to and from schools exempt from the tax imposed by the Chichester Act (Act No. 179, approved February 23, 1937)?

"2. Are the gross receipts derived from the sales of accessories, parts, and other equipment to county and city boards of education for repair, maintenance, and operation of school busses owned by said boards and used to transport children to and from school pursuant to the laws of Alabama, exempt from the tax imposed by said Chichester Act?"

It is my opinion that both of your questions should be answered in the affirmative. The operation of elementary and high schools in the State of Alabama is a State function. The State vs. County of Tuscaloosa (M.S.) The Sales Tax Act specifically exempts receipts derived from sales to the State of Alabama. Section 2 sub-section (f). County Boards of Education are mere agencies of State in the operation of elementary and high schools. The State v. County of Tuscaloosa, supra.

It is my opinion that the gross receipts derived from the sale of the articles mentioned in your aforementioned inquiry are exempt, as such exemption obtains for the same reasons as those exemptions which I mentioned in my letter to you of April 14, 1937. The principles of law sustaining the exemption are the same and they arise out of the same specific exemption provided in the Sales Tax Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Honorable J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

May 15, 1937.

License Schedule 35 does not cover hat cleaning for which license is required under Schedule 70.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 22, 1937, in which you request my opinion as follows:

"A man has procured a license under Schedule 35 to do a cleaning and pressing business where **wearing apparel** is cleaned or pressed. He cleans a few hats which is a wearing apparel. The license inspector has cited this man and says he is subject to license under Schedule 70. I contend that he is not subject to license under Schedule 70 as his license which he has under Schedule 35 covers cleaning and pressing of **wearing apparel**. Please give me your opinion immediately."

In my opinion, this question is one of fact. It is true that "hats" has been construed to be covered by the definition "wearing apparel". 1 Words & Phrases 7425, **Wanamaker v. Cooper**, 96 Fed. 465.

You will notice that the license required by Schedule 35 is for operating "what is commonly known as a cleaning or pressing business" while Schedule 70 is for conducting "what is commonly known as a hat cleaning establishment".

In reply to your question, therefore, in my opinion if the person in question is operating "what is commonly known as a hat cleaning establishment", he should pay the license levied by Section 70, regardless of whether he has paid a license under Schedule 35. If he is not operating "what is commonly known as a hat cleaning establishment", he is not liable for the license under Schedule 70. The mere fact that the licensee mentioned in your inquiry cleans a few hats in connection with his cleaning and pressing business does not subject him to payment of license under Schedule 70, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 15, 1937.

Hon. Bart B. Chamberlain,
Circuit Solicitor,
Mobile County,
Mobile, Alabama.

Alabama Sales Tax Act No. 126—

1. Liability of merchant for collection and remittance of tax not conditioned upon the State circulating tokens for payment thereof.

2. Gross Revenues received from interstate sale and shipment of merchandise is exempt from payment of the tax.

3. Gross receipts received from intrastate sale of taxed articles of merchandise are not exempt from payment of the tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"I am making this request for an opinion on the following points raised under House Bill No. 179 by Mr. Chichester: 'Alabama Luxury Tax Act'. I have requested the Hon. Bart B. Chamberlain, of this city, to join with me in this request for your opinion and he is signing this letter with me.

"Please advise us on the following points:

"1. The act begins its operation in Mobile County today. Through no fault of many of the merchants who make sales subject to the provisions of the act, no tokens have been provided to cover such sales. Section 26 of the act expressly provides for the issuance of such tokens. Is the merchant responsible for the tax?

"2. Assume that a non-resident of the State of Alabama writes a merchant in the State of Alabama asking that a shipment of certain goods be made from, for example, a merchant in Mobile to a purchaser in Pensacola. It would appear clear under such circumstances that no such sales tax would be imposed upon this transaction inasmuch as it would seem clear the transaction is one subject to the control and regulation of the United States rather than the State of Alabama. It is our belief any attempt to impose a tax would violate the clause of the Constitution relating to interstate commerce but we want your opinion on that point.

"3. Assume that a non-resident of the State of Alabama comes into the State and makes a purchase while here and directs the dealer to forward the article purchased by him to the State of his residence. Under such circumstances, must a tax be collected by the retail dealer selling the goods in the State of Alabama.

"4. It has been brought to our attention that in most states (among other, California) a non-resident of a state where a sales tax is imposed may make a purchase and give a certificate or affidavit to the effect that he is a non-resident and direct shipment of the goods purchased by him in the State of his residence and under such circumstances no tax is imposed. Could this be practiced in the State of Alabama if this method of handling a transaction is not expressly provided for by legislative enactment.

"Your opinion touching on these several points are of vital importance to the merchants of this community and we believe to the mer-

chants of the State of Alabama generally. May we request that you let us have the benefit of your opinion at your very earliest convenience."

It is my opinion that the failure of the State of Alabama to supply tokens for payment of the tax does not excuse collection and payment of the tax. The tokens are supplied to facilitate collection of the tax. I am unable to find any provision in the Act which makes collection and payment of the tax dependent upon these tokens being supplied.

It is my opinion that the transaction set forth in paragraph numbered 2 of your letter, constitutes interstate commerce and is therefore tax exempt. Section 2 (f) of the Chichester Act reads as follows:

"There shall be excepted from the gross receipts of sale so as not to be taxed so much thereof as is derived from business conducted in commerce between this State and other States of the United States * * *."

Bearing on the question of interstate and intrastate commerce, I quote from 12 C. J. page 26, paragraph 25, as follows:

"Section 25 Sale and Traffic in Goods—In General. That intercourse between citizens and inhabitants of different states which constitutes interstate commerce, and which is subject to federal, but not to state, regulation, includes not only transportation of persons and property, but also the purchase, sale and exchange of commodities, the very purpose and motive of that branch of commerce which consists in transportation being that other and consequent act of commerce which consists in the sale or exchange of the commodities transported. Delivery to the purchaser of goods in another state is an inherent and essential part of the intercourse defined by the word 'commerce'; and it is a general rule that a sale is a transaction of interstate commerce, subject to federal regulation but free from state laws consisting of taxation, foreign corporation, or other regulatory measures, where transportation of the subject matter of the sale from one state to another is essential to delivery to the purchaser and the consequent completion or performance of the contract of sale. The interstate features of the transaction are not destroyed by the fact that two separate shipments are combined in the state of delivery as an incident to delivery. To make a sale of goods interstate commerce, it is necessary that interstate transportation of the goods be involved, the fact that the goods sold are outside the state, or that the seller and the buyer are non-resident, not being sufficient. * * *"

"A completed contract of sale between residents of a state is not a transaction of interstate commerce, nor is a contract between citizens of different states, when the contract is made and delivery accepted in the state where the property is situated, although the buyer intends to ship the property outside the state."

The Supreme Court of Alabama has defined interstate commerce in the following cases: *E. A. Foy & Co. v. Haddock*, 191 Ala. 101; *Lee v. Town of LaFayette*, 153 Ala. 675; *Culverson v. American Trust & Banking Co.*, 107 Ala. 457.

If I may assume from your letter that the sale was completed in Alabama, it is my opinion that question 3 of your inquiry should be answered in

the affirmative. The sale is intrastate commerce and is subject to the tax **Ex Parte Conecuh Pine Lumber Company**, 180 Federal Report, 249 **Bruner v. Mobile Gulfport Lumber Company**, 188 Ala. 248, 66 So. 438. A sale is completed when title to the merchandise passes to the purchaser, even though the purchase price has not been paid nor delivery of the merchandise made. **McCray v. Young**, 43 Ala. 62; **Rolfe v. Huntsville Lumber Company**, 62 So. 537; 8 Ala. App. 487; **Southern States Company v. Long**, 73 So. 148, 15 Fed. 286. A completed sale is to be distinguished from an incomplete sale. The former supports an action based on title and the latter supports an action seeking damages for breach of a contract. Therefore, if the sale is completed after March 1, 1937, it becomes subject to the tax.

I know no law in Alabama which authorizes a non-resident of this state to make an affidavit of such non-resident and thus obtain an exemption from the payment of tax on merchandise, the sale of which is completed in Alabama.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 18, 1937.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,

Birmingham, Alabama.

Taxation—Appeal and Supersedeas Bond, Section 78, Revenue Act, 1935.

Execution and approval of supersedeas bond, Section 78, supra, suspends foreclosure for ad valorem taxes secured by the bond.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date, which I quote as follows:

"I have a number of tax accounts on my books for 1936 tax that were appealed to the Circuit court from the values fixed by the Board of Review, and supersedeas bonds filed as provided in Section 78 of the 1935 Revenue bill.

"On March 1, I certified these cases as delinquent to the Probate Court and the tax payers have raised the question that for the reason of the filing of the supersedeas bond in the Circuit Court upon making the appeal from the Board of Review that I am stopped from

further action in the matter of enforcing the collection of such account by advertising and selling the property.

"Please give me your opinion as to whether or not I should certify to the Probate Court such accounts as delinquents. In the event your opinion in the above matter is an affirmative one and in the event the Probate Court issues a decree directing me to proceed with the sale, will it not be necessary for the tax payer, if he wishes to appeal from the decree to the Circuit Court, to file another supersedeas bond even though he has filed such bond at the time of making his appeal?"

It is my opinion that the execution and approval of a supersedeas bond, pursuant to Section 78, Revenue Act of Alabama, 1935, suspends the lawful right of the tax collector to foreclose a lien of the State for taxes secured by the supersedeas bond pending the determination of appeal.

Section 78 reads in part as follows:

"When an appeal is taken the taxpayer shall pay the taxes due as fixed for assessment for the preceding tax year, before the same becomes delinquent, and upon failure to do so, the court upon motion ex mero motu must dismiss the appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient securities to be approved by the clerk of the Circuit Court in double the amount of taxes payable to the State of Alabama, conditioned to pay all taxes, interest and costs due the State, or any agency or subdivision thereof."

The aforementioned provision for execution and approval of a supersedeas bond appears for the first time as a part of the laws of Alabama. The purpose of this provision in my judgment is to authorize security for taxes in litigation and to suspend foreclosure of the lien. The provision specifically provides that the bond shall be in double the amount of the taxes payable to the State of Alabama, conditioned to pay all interest, taxes, and costs due the State, county or an agency or subdivision thereof. I premit any discussion of a question as to whether the execution and approval of the supersedeas bond destroys the lien of the State for the taxes secured.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. J. F. Anderson,
Clerk, Circuit Court,
Randolph County,
Wedowee, Alabama.

May 18, 1937.

Fees: Sheriff is entitled to receive a fee of \$1.50 for serving a copy of interrogatories on the adverse party, and making his return, as provided by Sections 7764 and 7765 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter in which you state:

"Question of cost has been raised to me as Clerk of the Circuit Court of Randolph County, Alabama:

"The question follows: Interrogatories were filed in the Circuit Court under 1923 Code Sections 7764 et sequitur:

"These interrogatories were served on the adverse party by the Sheriff: What fee, and in what amount was the Sheriff entitled for serving a copy of said interrogatories on the said adverse party, and making his return thereon."

It is my opinion that the sheriff is entitled to receive a fee of \$1.50 for serving the interrogatories on the adverse party, and making his return.

I wish to call your attention to a part of Section 7287 of the 1923 Code of Alabama, which is as follows:

"7287. Fees allowed to Sheriffs.—Sheriffs are entitled to receive the following fees for the following services: * * *

"Serving summons and other mesne process, and returning
the same \$1.50".

In my opinion, when the sheriff serves a copy of the interrogatories, he is in fact serving a summons on the party to come in and answer the questions propounded in the interrogatories.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 22, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

1. Where a Justice of the Peace issues a warrant returnable before him for an offense for which he has jurisdiction, he should endorse the amount of bond required on the warrant and if the defendant is unable to make the bond when arrested he should carry him before the Justice of the Peace and procure a mittimus committing him to jail until he does make such bond.

2. Where a Justice of the Peace sits as a Committing Magistrate and binds party over to wait action of the Grand Jury on the case, he should issue a mittimus to the Sheriff to confine the defendant in jail.

3. Where the Examiner of Accounts failed to find such mittimus or orders on file in the sheriff's office, but where the jail book shows that the defendant was placed in jail on a certain day and released on a certain day, the sheriff should be paid for feeding such prisoner regardless of whether he has on file the mittimus required under Section 4804, Code of Alabama, 1923, or not.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 5, 1937 in which you request my opinion as follows:

"1. Is there any authority for the Sheriff confining a person in jail on a warrant of a Justice of the Peace in a misdemeanor case without the person having been brought before the Justice of the Peace and a mittimus duly issued to the Sheriff for commitment to jail?

"2. In felony cases is it not mandatory for the Sheriff to have on file, in his office, mittimus or commitment papers for each person committed to jail?

"3. During the course of an examination of the Sheriff's Feeding Account the Examiner finds that proper commitment has not been issued and is not on file in accordance to Section 4804, shall not the Examiner call on the Sheriff's official bond to the State of Alabama for a refund of monies collected for feeding such prisoners?"

My answer to your first request is in the negative. When a warrant is issued by the Justice of the Peace for minor offense of which he has jurisdiction, he should make the warrant returnable to some set date and should endorse on the warrant the amount of bail required of the defendant. In other words, the Justice of the Peace should set the bond. Then, when the defendant is arrested, the sheriff or constable making the arrest, if the defendant can make bond in the amount set by the Justice, the officer making the arrest should release him. But, in case he cannot make such bond, then it is the duty of the officer making the arrest to take the defendant before the Justice and procure from him an order committing the defendant to jail to wait trial unless in the meantime he makes bond for his appearance on the day set for trial. You will note under Section 5221 of the Code of Alabama, 1923, the form for warrant of arrest by Justice of the Peace is set out and such warrant says nothing about committing to jail, but simply says bring him before me. But, if the Justice on issuing the warrant sets the amount of bail to be required, then the defendant could be released on making such bond returnable on the day the case is made returnable. It is different on a warrant issued from the Circuit Court on indictment. Here the warrant carries with it a mittimus. It says commit to jail if it is a felony; if it is a misdemeanor it says unless he makes bond, commit to jail. See Section 3279, 3280, Code of Alabama, 1923.

Now the rule is, if the Justice of the Peace tries the defendant for an offense of which he does not have final jurisdiction, then he does not sit as a Justice of the Peace, but as a Committing magistrate and all he can do is to bind the defendant over to the Grand Jury. If the evidence shows probable cause in this instance, he must give the sheriff or constable an order committing him to jail, that is, if the case is not bailable. But, if it is bailable, the order of mittimus should recite he is committed to jail, unless he makes bond in the sum set by the Magistrate. Quarterly Report of the Attorney General, Volume II, page 133, Question 23; Biennial Report of the Attorney General, 1932, page 514.

As to your third request, if the sheriff fails to have such mittimus on file as required by Section 4804, Code of Alabama, 1923, I would not say that this is such a derelict of duty as would bar the sheriff from collecting the feed bill. If the sheriff has actually had the prisoner and has actually fed and cared for him, I believe that justice and equity demands that he be paid and if he has been paid, that he should not be required to refund the money collected. Of course, his jail book should show when he was received in jail and when he was discharged from jail, but to make an iron clad rule that he must be able to produce the mittimus, I think would in many instances work an unjust hardship.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 22, 1937.

Hon. O. L. Andrews, Clerk,
Circuit Court of Jefferson County,
Birmingham, Alabama.

1. Costs and fees—joint trial—In a case in which sixteen defendants have been jointly tried, only one solicitor fee and court reporter's fee should be charged.

(1) Said fees should be prorated among cost bills of defendants.

2. Officer's fees in Jefferson County should be paid into the County Treasury since all officers are paid salaries.

Opinion by Assistant Attorney Small.

Dear Sir:

You request my opinion as follows:

"Recently in this Court sixteen defendants charged with felonies were tried jointly by agreement on separate indictments and in cases

which were docketed separately. Will you kindly give me your opinion on the following questions:

"1. The defendants not having been jointly indicted, should the Clerk charge a Solicitor and Court Reporter's Fee in each of the sixteen cases or should only Solicitor and Court Reporter's Fee be charged?

"2. If only one Solicitor and Court Reporter's Fee should be charged, how is the Clerk to determine which case it should be charged in?

"3. The Clerk of the Circuit Court collects fees belonging to various officers, such as Sheriffs, Constables, and Witness fees, in cases that are appealed from or bound over to the Grand Jury from Inferior Courts. Should the Clerk remit all these fees to the Inferior Court or Committing Magistrate as they are charged in his transcript or should he separate fees belonging to other than said Inferior Court and pay direct to officers to whom they belong? For example, the Sheriff of Jefferson County makes practically all arrests on warrants, and serves all subpoenas issued from the Jefferson County Court of Misdemeanors and Felonies. Where the case is appealed to the Circuit Court or bound over to the Grand Jury from said Court, the Clerk of the said Court prepares a transcript which includes a cost bill with the Sheriff and other fees included; should the Clerk of the Circuit Court remit these fees when collected to the Clerk of the Inferior Court for him to pay to proper officers or should the Clerk of the Circuit Court pay them to the officers to whom they belong?

"4. Can a defendant convicted in a Bastardy proceeding be sentenced to hard labor for the County on failure to pay the cost in the case?

"5. Section 3667 of the Code of 1923 sets out the items of cost to be paid by the Convict Department where a defendant is convicted and sentenced to the penitentiary. It provides for the fees of Committing Magistrate and Constable on preliminary trial both not to exceed five dollars.

"Section 3755 provides that the Committing Magistrate and Constable on preliminary trial are entitled to fees both not exceeding ten dollars and that the witnesses for the State before the Committing Magistrate are entitled to witness fees not exceeding ten dollars.

"Where a defendant is sentenced to the penitentiary and the fees of the Committing Magistrate, and Constable exceed \$5.00, the amount to be paid by the State, under Section 3667, should the Clerk issue an execution against the defendant for the difference and also for the witness fees accruing before the Magistrate?

"6. Where a defendant is convicted and sentenced to the penitentiary, should the Clerk issue an execution against the defendant for the difference between the cost that actually accrues in the case and the amount paid by the Convict Department?

"7. If your answer to the sixth question is in the affirmative, should the execution include Removal Bill, and value of property where not restored to the owner, in cases where these items appear?"

In reply to your first question I wish to advise that in my opinion, the cost bills here considered should include only one solicitor's fee and one stenographer's fee. The solicitor's fee is earned upon the conviction of the defendant. A conviction may be of one or many defendants. The number of persons convicted does not give plurality to the conviction when all the defendants are convicted in joint trial, as all defendants are included in the one conviction. I refer you to the case of *Brown et al v. State*, 46 Ala. 148 and to the authorities cited therein. See, also, Biennial Report of the Opinions of the Attorney General, 1930-1932, p. 532 and authorities cited therein.

These fees should be prorated among all the defendants. See Biennial Report of the Attorney General, 1926-1928, p. 250. See, also, *Brown et al v. State*, supra. I wish to refer you, also, to an opinion addressed to Hon. Chas. W. Lee, State Comptroller, under date of November 29, 1935, reported in Quarterly Report of Attorney General Vol. I, page 250.

Your second question is answered in the reply to your first question.

In reply to your third question, I wish to advise that it is my understanding that all officers in Jefferson County are paid salaries in lieu of fees and other compensation as provided for by Constitutional Amendment and various Acts of the Legislature governing the officers concerned. It therefore becomes incumbent upon the clerk to pay the officers' fees into the County Treasury.

In reply to your question numbered four, I refer you to Section 3428 of the Code of Alabama of 1923 and the authorities cited thereunder, which provides as follows:

"Judgment on failure to give bond.—On failure to give such bond, the court must render judgment against the defendant for such sum as, at legal interest, will produce the amount directed to be paid yearly; and he must also be sentenced to hard labor for the county for one year; unless in the meantime he executes the bond required, or pays the judgment and costs. If the defendant is sentenced to hard labor, the proceeds of his hire or labor shall be paid to the judge of probate for the support and education of the child, as is provided in Section 3427 (6376) of this Code."

I also wish to refer you to an opinion of the Attorney General rendered to Hon. B. Cooper, County Treasurer, under date of April 28, 1931 reported in Office Edition, Book 3, p. 312 and to an opinion of the Attorney General rendered to Hon. F. W. McLane, Circuit Clerk of Talladega County, under date of January 15, 1932, reported in Office Edition, Book 3, p. 165.

In reply to your fifth and sixth questions, I wish to refer you to an opinion of the Attorney General addressed to Hon. Charles W. Lee, State Comptroller, under date of February 7, 1936 reported in the Quarterly Report of Opinions of the Attorney General, Vol. 2, p. 118.

In reply to your seventh question that concerns the value of property where not restored to the owner, I wish to refer you to an opinion of the Attorney General addressed to Hon. O. L. Andrews, Clerk of Circuit Court of Jefferson County, under date of June 26, 1936, a copy of which I enclose. As

it concerns removal bills, I wish to refer you to Section 3741 of the Code of Alabama of 1923. I wish to further refer you to the following opinions of the Attorney General:

Biennial Report—1930-1932, p. 980.

Biennial Report—1928-1930, p. 565.

Biennial Report—1928-1930, p. 592.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 22, 1937.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer, Alabama.

Taxation—Assessment by owner of Sales Certificate issued to the State.

1. Owner of Sales Certificate purchased from State may assess the property before the end of the current tax year without penalty.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your recent inquiry which I quote as follows:

“When a sales certificate has been assigned and the person receiving assignment assesses the property, am I supposed to charge him a fifty-cent delinquent fee and ten per cent penalty?

“For example, a piece of property sold to the State for 1935 taxes and a person purchased the sales certificate, paying the 1935 and 1936 taxes after the penalty for late assessment had accrued. Should he be penalized on 1937 tax assessment?”

It is my opinion that the assignee or owner of the sales certificate of land sold the State of Alabama for payment of taxes is lawfully entitled to assess the land for taxation during the current tax year without penalty.

Many of the reasons set forth in an opinion of this office to Mr. John I. Smith, Tax Collector, Etowah County, Gadsden, Alabama, dated August 15, 1936, appearing in the Quarterly Report of the Attorney General, Vol. 4, page 139, have forceful application to, and support the conclusion herein. The applicable reasons set forth in this cited opinion are adopted and made a part of this opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 22, 1937.

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

License Inspector—Not entitled to citation fee in citing operators of motor vehicles who have failed or refused to make application for replacement of lost tags.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 5, 1937, enclosing letter of Hon. J. A. Carnley, Judge of Probate, Coffee County, requesting my opinion as follows:

"We are in receipt of the following letter from the Judge of Probate of Coffee County, Alabama.

"Is there a provision in the revenue Code for a fee to be collected for the license inspector in cases where automobile owners are cited to apply for replacement tags?

"We have a number of people who have lost their front tags and the license inspector has cited them to apply for replacements. I would like to know if we are required to charge them a fee, or rather are we responsible to the License Inspector for a fee when we fix up the application and send it in for replacement tags? Will appreciate your early reply."

"As the Tax Schedule Code is not clear, will you be kind enough to give this your attention and an early ruling as to whether a license inspector would be entitled to a citation fee in citing operators of motor vehicles who have failed or refused to make application for replacement."

Section 353 (a) provides:

"If the license Inspector shall discover any motor vehicle being operated without a **proper or legal license**, he shall cite the operator of the motor vehicle, and in filing copy of such citation with the Probate Judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof."

Thus we note that a vehicle being operated without a front tag, while in fact being operated in violation of the provisions of the law above quoted, is not necessarily "being operated without a proper or legal license" within the meaning of Section 353 (a), quoted supra. For where the proper tags have been procured and one or both are lost it cannot be said that the owner of the motor vehicle in question has not a "proper or legal license". It is true that he does not have the **evidence** of such license, i. e., the license plate or tag, but under the facts detailed in your inquiry he has in fact the proper license in that he has paid for his original tags.

Moreover, the replacement tags in question must be procured, not from the Judge of Probate, but from the State Tax Commission as provided by

Schedule 158.16. This is another fact which leads to the conclusion that the license inspector is not entitled to the citation fee of \$1.50 for citing operators of motor vehicles who have failed or refused to make application for replacement.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 24, 1937.

Hon. Houston Cole,
Superintendent of Education,
Tuscaloosa County,
Tuscaloosa, Alabama.

Schools—Free Text Books—

Cost of reconditioning and repairing free text books may be paid by County Board of Education (School Code of 1927, Section 452).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I should like to know if it is legal for this office to pay for repairs on the free text books furnished the schools of Tuscaloosa County. You understand that these books are furnished out of the schools funds of the State of Alabama."

Your inquiry must be answered in the affirmative.

The statute authorizing State appropriations for the procurement of free text books makes no express provisions for reconditioning or repairing of such text books after the same have been procured and issued for use.

However, Section 452 of the Alabama School Code of 1927 provides:

"452. COUNTY AND CITY MAY ASSIST IN PURCHASING BOOKS. —County Board of Education, City Boards of Education, the Courts of County Commissioners, and other like governing bodies of the Counties or municipalities, shall have power and authority to appropriate funds for the purpose of purchasing textbooks for free distribution or for rental to the patrons of its public schools under such rules and regulations as shall be prescribed by the respective County Boards of Education or City Boards of Education."

In my opinion, this provision, by necessary implication, affords authority to pay the necessary costs of reconditioning and repairing such free text books.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Attention of Mr. Wampold.

Alabama Beverage Control Act—Wholesalers, distributors and/or jobbers of malt or brewed beverages doing a transient dealer's business are liable for license imposed by Schedule 147 of Section 348 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 8, 1937, which is as follows:

"The License Inspector has cited the Beer Dealers under Schedule 147 for Transient Dealers License; \$30.00 to the State and \$5.00 to the County. These dealers have protested and state that they do not come under this Schedule for two reasons: First, Beer was illegal at the time this Schedule was passed and Second, that they would be exempt the same as Soft Drinks.

"So that you will clearly understand, these dealers are wholesale distributors of beer; they load a truck at their place of business in the morning and then they call on the dealers, sell and deliver beer by the case and pick up empty cases.

"The matter of license is pending an opinion from this office, and I will thank you to give me this as soon as possible."

In answer to your inquiry, I am of the opinion that wholesalers, distributors and/or jobbers of malt or brewed beverages, who do business as transient dealers, are liable for the license under Schedule 147 of Section 348 of the Revenue Act of 1935.

Schedule 147, *supra*, imposes a license on transient dealers as therein defined. The liability under this schedule is dependent on the manner in

which such business is conducted.—**Quarterly Report of Attorney General, Vol. 2, pp. 310.** When a wholesale merchant allows his salesmen to sell goods and make deliveries from his trucks, then he is not conducting a regular wholesale business, but come within the classification of a transient dealer. **Quarterly Report of Attorney General, Vol. 2, p. 164.**

Assuming that the method of doing business by the wholesalers, distributors and/or jobbers of malt or brewed beverages in question comes within the definition of transient dealers as defined in Schedule 147, *supra*, the question then presents itself as to whether or not such dealers are otherwise exempt from the payment of said license.

I find nothing in Schedule 147, *supra*, itself that would exempt them from the payment of said license. They do not come within the exemption under Schedule 33 and Schedule 159.16 of Section 348 of the Revenue Act of 1935. Neither do they come within the exemption under Section (k), subsection 2 of Section 147, as they are not dealers of bottled soft drinks in a county where such bottling plant is located. In my judgment, malt or brewed beverages can, in no sense of the word, be considered as soft drinks as suggested in your inquiry.

The fact that the sale of malt or brewed beverages, as defined in Alabama Beverage Control Act, was illegal at the time of the enactment of the license schedule in question, in my judgment, is immaterial. The schedule imposes a license on transient dealers regardless of the nature of the products sold or offered for sale (With certain exceptions specifically enumerated). The license is on the method of doing business and not on the kind or nature of the commodity or products sold or offered for sale.

It may be argued that the licenses and taxes imposed by the Alabama Beverage Control Act are exclusive and that no other form of taxation is, or should be, imposed on those who have paid the licenses and taxes required by said Act. However, this argument is negated by the express provision of Section 27 of the Alabama Beverage Control Act, which provides as follows:

“Section 27. That in addition to all other taxes now imposed by law and in addition to licenses provided for in this Act, there is hereby levied a license or privilege tax on every person licensed under this Act who sells and/or stores and/or receives for the purpose of distribution to any person, firm, corporation, club or association within the State of Alabama malt or brewed beverages as hereinabove enumerated and defined, either or all, a tax shall be measured by and graduated in accordance with the volume of sales of such persons, said tax to be collected by the Alabama Alcoholic Beverage Control Board in the following amounts and in the manner hereinafter set forth.”

It will be noted from the above language, that the specific tax therein levied shall be in addition to all the taxes now imposed by law, and in addition to the license provided for in said Act. This shows, in my judgment, a legislative recognition that the wholesalers, distributors and/or jobbers of malt or brewed beverages are subject to other taxes than those specifically provided for in said Act. Such recognition is tantamount to the legislative intent that such dealers shall be subject to other taxes or license fees already imposed by law if same otherwise properly attach.

The premises considered, it follows that the dealers in question, doing a transient dealers business within the definition set out in Schedule 147, supra, are subject to the license fees imposed thereunder.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 29, 1937.

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Alabama Beverage Control Act—Hotel, club or restaurant within police jurisdiction of city liable for not exceeding one-half city license; city may collect beer license from persons doing business within police jurisdiction of city; city has no authority to refuse to issue license where state and county license has already been issued.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

“Please advise me whether under Section 11 (a) of the Alabama Beverage Control Act a hotel, restaurant or club located without the city limits but within the police jurisdiction thereof, is liable for both County License and city license.

“Please inform me, also whether a city may collect beer licenses from persons, etc. doing business wholly without the corporate limits of the city, but within the police jurisdiction thereof; also whether the city has the authority to refuse to issue license where the state and county license have already been issued.”

In my opinion your first inquiry should be answered in the affirmative. There are no provisions in the Alabama Beverage Control Act with respect to licenses by municipalities, and the general law as to such licenses prevails. Act No. 580 of General Acts, 1927, at page 674, reads in part as follows:

“That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town and without the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like businesses, trade or profession done within the corporate limits of such city, fees and penalties excluded.”

Under the authority of this Act, a municipality may fix and collect licenses for hotels, clubs or restaurants doing business within the police jurisdiction thereof, subject, however, to the limitation as set out in the opinion of this office to you under date of April 20, 1937—that is, the city must be located within a wet county.

The same opinion is reached as to the authority of the city to collect beer licenses from persons doing business wholly without the corporate limits of the city but within the police jurisdiction thereof.

Your third inquiry is whether the city has the authority to refuse to issue license where the State and County license have been issued. If you intend this inquiry to apply to hotels, clubs and restaurants, I refer you to Section 11 (b) of the Beverage Control Act, which requires applicants for such State licenses to secure the approval of the governing board of the city within which they propose to do business.

Insofar as this inquiry is addressed to the right of the city to refuse to issue licenses to beer dealers already license by the State and County, it is my opinion that such city has no authority to refuse to issue license to one already licensed as required by the Alabama Beverage Control Act. Section 89 of the Constitution reads: "The legislature shall not have power to authorize any municipal corporation to pass any laws inconsistent with the general laws of the State." In *Mitchell v. City of Birmingham*, 222 Ala. 389, 133 So. 13, the Supreme Court said:

"If the state law clearly establishes a public policy as to the personal rights of a citizen, or clearly extends the privilege of doing a specified business to all places in the state upon payment of a license, then no general grant or charter power will warrant a municipal corporation prohibiting such business. A licensed business is a lawful business. One act cannot be both lawful and unlawful under the positive laws of the same sovereignty."

In my opinion, therefore, the city has the authority to levy a reasonable license for selling beer within the police jurisdiction of the city, but has no authority to prohibit the selling of beer by one legally licensed to do so by the State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. William A. Conrad,
Deputy Clerk, Circuit Court,
Mobile, Alabama.

June 2, 1937.

Execution may be issued as often as is necessary on judgments growing out of forfeitures.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"If the Circuit Court renders a final judgment of forfeiture in a criminal case against defendant and his sureties we will say for \$500.00 and costs of forfeiture, and the Clerk of said Court performs his duty within the time required by law, that is, issues execution against defendant and his sureties for same amount and costs, and places same in the hands of sheriff and sheriff returns said execution to Court for an alias, is it the duty of the Clerk to issue an alias execution, and if it is the duty of the Clerk to issue an alias execution, is there any limited number of alias executions the Clerk is required to issue on return of sheriff for an alias."

I think you may issue as many alias executions on a judgment growing out of a forfeiture in a criminal case as is necessary to enforce the collection. It must be understood that all criminal matters when they have reached the status of a judgment, become civil proceedings in their nature and are collected as all civil judgments, I call your attention to an opinion of this office written March 16, 1937, to Hon. Charles W. Lee, State Comptroller, Capitol, which in fact answers your request.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 2, 1937.

Hon. L. R. Stone,
County Superintendent of Education,
Bibb County,
Centreville, Alabama.

School Trustees—Upon consolidation of schools trustees should be nominated and appointed for the consolidated school.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"During 1936 trustees were elected for all schools and later on Sept. 21, we had an election to consolidate four of our schools. Do all twelve trustees have the right to serve this consolidated school until their term expires in 1938? Do the local trustees where the school is located have full authority over the school regardless of the opinions of the other nine?"

Both of your inquiries must be answered in the negative.

Section 133 of the Alabama School Code of 1927, as amended by Acts of 1935, page 1092, provides:

"SCHOOL TRUSTEES: QUALIFICATIONS AND SELECTION.—
The county board of education shall appoint for every school in the county from six discreet, competent and reliable persons of mature years nominated by the patrons of the said school, three persons residing near the schoolhouse, and having the respect and confidence of the community, to serve as trustees of the school, to care for the property, to look after the general interest of the school, and to make to the county board of education, through the county superintendent of education, from time to time, report of the progress and needs of the school, and of the will of the people in regard to the school; provided, that the term 'patrons' as used herein shall be construed to mean the parents and guardians of children in attendance at the school and, whether parents or guardians or not, qualified electors residing in the attendance district of the school."

See Quarterly Report of the Attorney General, Volume III, page 88.

It seems to be the legislative intention that, when by proper proceedings schools are consolidated, trustees for the consolidated school shall be nominated by the patrons thereof and appointed by the County Board of Education; and that thereupon the authority and duties of the trustees of the several consolidating schools shall cease. Compare Biennial Report of the Attorney General, 1928-30, page 307.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 4, 1937.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

County governing body can legally appropriate county funds for the purpose of leasing office space necessary to accomodate agencies of the county government. The price of the lease may be paid in a lump sum.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I acknowledge receipt of your letter of May 12, 1937, which is as follows:

"Butler County has no adequate office accommodations for the Public Health Department; the Public Welfare Department, and the Agricultural Extension Department and the City of Greenville, with the

assistance of W. P. A. is erecting a public building on a large lot owned by the City in which when completed there will be sufficient office space for the above mentioned agencies.

"It is proposed that the County shall contribute the sum of \$5,000.00 toward the cost of the building, in consideration of which the City will execute a lease to the County for a term of twenty-five years on the entire second floor of the building.

"I shall appreciate your advice as to whether the County would be authorized to appropriate funds for the purpose mentioned from available monies in the general funds not otherwise appropriated."

I am of the opinion that your inquiry must be answered in the affirmative.

Section 6755, Code of Alabama, 1923, as amended (See Michie's Code) is, in part, as follows:

"6755. Authority of court.—The court has authority—1. To direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, including the circuit judge, if resident in the County, and to change the location of the courts, and the designation of the rooms for offices, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. **In the event the court-house is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and pay the rental from the county fund.** * * * " (Emphasis ours)

This office has heretofore held that the county governing bodies are authorized to lease buildings for the use of the departments of the county government in cases where the courthouse is not adequate. It is true that those opinions contemplated a monthly rental payment but I can see no reason why the county governing body could not provide for payment of the rental in a lump sum as is contemplated in the instant case. **Biennial Report of the Attorney General, 1932-34, p. 595; Biennial Report of the Attorney General, 1932-34, p. 629.**

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. R. J. Westbrook,
Clerk Circuit Court,
Linden, Alabama.

June 7, 1937

1. Trial tax cannot be charged in forfeiture case against the defendant in bail.

2. The charge for final record on forfeiture case against defendant in bail is \$.50. For final record of the original criminal case the Clerk is entitled to \$.15 per one hundred words.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 20, 1937, in which you request my opinion as follows:

"Is a trial tax chargeable in a case where a forfeiture has been taken if he has already paid a trial tax in a suit prior to the suit where the forfeiture was taken against him and his bondsmen. Should this trial tax be refunded if you say it is not chargeable in the above mentioned case.

"What should the charge be for final record in a case where a forfeiture has been taken, criminal. Is there any certain price for a final record in criminal cases."

Answering your first request, I call your attention to Section 9 of the 1935 Revenue Act, which is, in part, as follows:

"* * * * nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, and cases for municipal assessments shall not be subject to such tax, and tax cases."

This section says, as you will note, no trial tax can be charged in any ancillary proceeding where a trial tax has been imposed in the original case. Certainly forfeiture on a criminal bond is an ancillary proceeding where a trial tax is chargeable in the original case. Therefore, such proceedings could not be subject to this tax. Biennial Report of the Attorney General, 1932-34, page 390.

As to your second inquiry, I call your attention to Section 3739, Code of Alabama, 1923, where it says:

"Final judgment of forfeiture against the defendant—\$.50."

Therefore, you can only charge fifty cents for final record on a forfeiture against defendant in bail. Again I call your attention to Section 3739, supra, where it says:

"Final record, for each hundred words—\$.15."

Therefore, in making your final record in the original criminal case against the defendant you would be entitled to fifteen cents for each one hundred words contained in said record.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Code Section 9023—Judge of Probate may not require fee for attestation to be paid at time of filing power of attorney for record.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of May 17, 1937, in which you request my opinion as follows:

"I would like to have your official opinion on the following question:

"A power of attorney is presented to me as Probate Judge for recordation, this power of attorney authorizing some named individual to cancel of record a real estate mortgage. Is the Probate Judge authorized to require, at the time such power of attorney is offered for record, payment of an additional fee of twenty-five cents over and above the cost of recording the power of attorney, to cover the attestation of the cancellation to be subsequently made under authority of the power of attorney?

"In other words, may the fee of twenty-five cents referred to in Section 9023 of the Code of Alabama be collected at the time a power of attorney to cancel a mortgage is filed of record, or may such fee of twenty-five cents be collected only when the Probate Judge is called upon to actually attest the entry of satisfaction and cancellation?"

In my opinion your inquiry should be answered in the negative. It has been ruled by this office that the Judge of Probate is entitled to his fee for attesting only where such attestation is made. Quarterly Reports, Vol. III, p. 24. This opinion further held that the Judge of Probate was not required to attest satisfaction under Code Section 9023, unless satisfaction is made pursuant to written demand by the mortgagor. As such written demand for attestation may or may not be made, it is impossible for you to determine in advance that such fee will be earned, and you are not authorized to collect a fee for attestation when the power of attorney is filed for record, but only when called upon to attest entry of satisfaction.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Pensions—Proceeds of warrant due to estate of deceased Confederate Veteran who was married two years prior to his death and who leaves no minor children, should be disbursed according to the provisions of Section 2969, Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 10, 1937, in which you request my opinion as follows:

"Please give me an opinion as to the following: What disposition should be made on July 1, next of the proceeds of a quarterly pension warrant due to a Confederate Veteran who has died since April 1st, and whose widow was married to him about two years ago and there being no minor children. I refer you to Section 2969 of the Code of 1923 and to later Acts of the Legislature."

In reply, I wish to advise you that in my opinion the disposition of the proceeds of the quarterly pension warrant due to a Confederate Veteran under the circumstances which you have outlined in your letter is according to the provisions of Section 2969 of the Code of 1928. (Michie's Code).

I note that you say this Confederate Veteran leaves a widow who had been married to him about two years at the time of his death and that there are no minor children surviving the veteran. In my opinion, the widow of this veteran will not be entitled to any part of the pension proceeds. I refer you to Section 2938 of the Code of 1928 (Michie's Code), which provides as follows:

"2938. WIDOWS OF SOLDIERS AND SAILORS ENTITLED TO PENSION.—The widow of any soldier or sailor in the service of the State of Alabama or the Confederate States of America such as is set forth in the preceding section, who was married to such soldier or sailor prior to January 1st, 1903, and who has not remarried since the death of such soldier or sailor as whose widow she makes application for pension, and who was not at the time of her husband's death separated from him by divorce or was not voluntarily living apart from her husband during the period of one year prior to his death and whose husband did not desert the service of the State of Alabama, or of the Confederate States, and who at the time of filing said application does not own real or personal property or both to the value of five thousand dollars, whether in fee simple or life interest therein or whose income from all sources does not exceed twelve hundred dollars per annum, who is an actual bona fide resident of Alabama and has been such for a period of three years prior to the filing of said application shall be entitled to relief under the provisions of this article."

You will note that under the provisions of the above quoted section 2938 the widow of the Confederate Veteran is not entitled to be placed on the pension roll or to receive the proceeds of the veteran's pension unless she was married to him prior to January 1st, 1903. It is, therefore, my opinion that the proceeds of the warrant to which you refer in your request should be disposed of according to the provisions of Section 2969 as follows:

"ON DEATH OF PENSIONER DELIVERY OF NEXT QUARTERLY PAYMENT.—Should a pensioner die leaving a widow, who would be entitled to a pension under the provisions of this article, or if there be no widow, leaving a minor child or children, or should a widow die leaving a minor child or children, the probate judge shall deliver the warrant of the next quarterly issue, succeeding the death of said pensioner, to the widow, or if there be no widow, to the minor child or children of such pensioner, and should there be no widow or minor child of such deceased pensioner, the probate judge shall endorse such fact on the pension warrant and collect the same and apply the proceeds, first to the payment of the burial expenses, and second, to the expenses of the last illness of the pensioner, attaching thereto a receipt or statement of payment of such expenses." (Emphasis ours).

I wish to further refer you to Biennial Report of the Attorney General, 1930-32, page 567.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 7, 1937

Hon. T. W. Shields,
Sheriff, Marengo County,
Linden, Alabama.

Sheriff or other peace officers are entitled to their transfer fees for transferring a defendant in a misdemeanor case from one county to another, regardless of by whom the warrant was issued.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 16, 1937, in which you request my opinion as follows:

"Please advise me whether or not this county is liable for a removal bill for bringing a prisoner, who is charged with a misdemeanor, from the jail in another county to the jail in this county on a warrant issued by the County Court Judge.

"Section No. 3741 of the Code of 1923 states that I would be entitled to pay for removal of a prisoner on a warrant issued by a justice of the peace, or on an indictment, but does not mention the county court."

My answer to your request is in the affirmative. I am aware of the fact that Section 3741, Code of Alabama of 1923 says, among other things, "on warrants issued by justices of the peace or on indictments," but I find that the County Court has jurisdiction concurrent with the Circuit Court of all misdemeanors committed in the county. Under Section 3815, Code of Alabama of 1923, we find cases are brought in the County Court by warrants or affidavits issued by the Judge of the County Court or by justices of the peace, made returnable to the County Court and while Section 3741, supra says "on warrants issued by justices of the peace or on indictments," I cannot but believe that this section refers to the transfer of parties charged with misdemeanors rather than to the officers issuing the warrants. To hold otherwise would virtually destroy the County Courts. I think the thing uppermost in the mind of the Legislature was to provide a method of bringing parties charged with misdemeanors back to the county for trial and they were not interested so much in the officers issuing the process and, therefore, it applies to cases sworn out before justices of the peace, Judge of County Court or any other officer authorized to issue warrants or affidavits on misdemeanors.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Where there is a confession of judgment in a criminal case under Section 5288, Code of Alabama, 1923, the cost of the prosecution is the first item to be paid. After this is paid then whatever amount is collected goes to discharge the fine.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 5, 1936, in which you request my opinion as follows:

"Opinion of the Attorney General is hereby requested on the following matter:

"For example, John Doe is fined \$100.00 and cost, the cost amounting to \$40.00 and same is secured and payments made from time to

time and the defendant dies or F1 Fa returned by Sheriff vs. Defendant and securities "No Property Found" leaving a balance due of \$60.00 would I be in the clear and entitled to distribute to all due cost the total amount of cost due each and then apply the \$40.00 on the fine and not prorate the \$80.00 to every item including fine? Would not the same rule apply to fine and cost in criminal cases as to judgments in civil cases, it being true in civil cases that cost is distributed first and whatever is remainder if not paid in full is applied on judgment?"

Where there is a conviction for a misdemeanor and the defendant is released under Section 5288, Code of Alabama, 1923, on confession of judgment then the process of collecting the fine and costs becomes a civil matter from there on out and the same is treated as such.

I call your attention to an opinion of this office written June 9, 1936, to Hon. Chas. W. Lee, State Comptroller, Quarterly Report, Attorney General, Vol. 3, page 150. It is my opinion the cost is the first item to be paid and when this has been done, then whatever balance is left over goes to the payment of the fine as stated above. The collection of the fine and cost after confession is a civil process. I call your attention to an opinion of this office written June 26, 1936, to Hon. William D. Peeler, Clerk of the Circuit Court of Equity, Lauderdale County, Quarterly Report of the Attorney General, Vol. 3, page 217.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

License Inspector not entitled to fee for citation to new owner of automobile failing to report change of ownership within five days.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Schedule 158.14 of Revenue Acts provides for transfer of Motor Vehicle ownership and for such change in ownership to be reported to the Probate Judge within five days from date of such change.

"In case a transfer was not reported to the Probate Judge within five days as provided by law and the License Inspector should cite

such person to appear before Probate Judge and make proper transfer will the License Inspector be entitled to citation fee of \$1.50 for such notice, in other words would I be required to collect this citation fee for the License Inspector."

In my opinion, your inquiry should be answered in the negative. It is well settled that an officer is not entitled to a fee unless it is expressly provided by the statute. Section 353, Subsection (a) of the General Acts of 1935 requires a License Inspector to cite the operator of the motor vehicle being operated **without a proper or legal license** and in filing copy of such citation with the Probate Judge he shall show on such citation the particular motor vehicle operated without legal license, as well as the operator thereof. It further provides under subsection (g) that the License Inspector is entitled to \$1.50 for each citation served, to be taxed against the delinquent. In construing this statute, it is my opinion that the License Inspector is entitled to a fee for serving such citation only where motor vehicle is being operated without a proper or legal license.

Schedule 158.14 of the Revenue Act provides as follows:

"(a) When proper motor vehicle license tags shall have been bought for the current tax year for a motor vehicle and such motor vehicle shall have been sold or transferred to a new owner or to new owners, either once or successively, such motor vehicle license tags shall remain on such motor vehicle in the hands of the new owner or successive owners for the balance of the tax year, **and no new or other license tags need be taken out** for the operation of such motor vehicle until the beginning of the next tax year. Provided, each and every change of ownership of such automobile, or other motor vehicle, and the name and address of the new or successive owner are noted by the Probate Judge on his record of the license and reported by him within ten days after such change in ownership is reported to him to the State Tax Commission and it shall be the duty of the old and new and successive owners to report such change in ownership to the Probate Judge within five days from such change in ownership."

Under the first part of said Schedule, it is provided that when proper motor vehicle license tag shall have been bought for the tax year, no other license tags need be taken out for such vehicle until the next tax year. This portion of the Schedule is absolute and is not conditioned on proper report of change in ownership being made to the Probate Court. Although it is made the duty of both the old and new owners to report such change in ownership, no penalty for failing to do so is specified by the Act other than by Subsection (d), subjecting such owner to fine or imprisonment. It is therefore my opinion that under the express provision of Schedule 158.14, a motor vehicle being operated with a proper motor vehicle license tag bought for the current tax year may be operated without a new or other license tag, even after the transfer of ownership and after five days after transfer of ownership without report of such change of ownership and therefore the License Inspector has no legal authority to cite the operator of such vehicle for operating a vehicle without proper or legal license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Driver's License Renewal—Applicant has from October 1 to November 15 of each year in which to procure such license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Will you please give me an opinion on Section 1 of an Act of the Legislature of 1935 known as the Driver's License Act, Acts 1935, page 756. I want an opinion on this particular point: Is a person who procured a license for the year October 1, 1936, through September 30, 1937, entitled to secure a new license for the year beginning October 1, 1937, at any time between October 1st and November 15th?"

In answering your request, I call your attention to Section 1 of an Act approved September 2, 1935, General Acts 1935, page 756, known as the Driver's License Act.

"Section 1. That every person, except those hereinbelow exempted before operating or driving any motor vehicle upon a public highway in this State, shall procure a driver's license. The first license shall be obtained between October 1, 1935, and November 15, 1935, and shall expire September 30, 1936, and a like license or renewal thereof shall be obtained annually thereafter." (Emphasis supplied).

You will note the underlined portions of the above section provide that the first license was to be obtained between October 1, 1935, and November 15, 1935, and that the renewal thereof should be obtained "annually thereafter." In my opinion, the word "annually" carries the import that the same period of time be given for obtaining a license in the subsequent years as in the first. The Pertinent sentence says that "The first license shall be obtained between October 1, 1935, and November 15, 1935." Then follows the statement that "a like license or renewal thereof shall be obtained annually thereafter." Thus it would appear that a license might as well be obtained on October 6, 1936, as on October 1, 1936, and still be obtained "annually thereafter" with relation to the date "between October 1, 1935, and November 15, 1935."

I therefore advise you that a renewal of the driver's license provided for by the 1935 Act, supra, may be obtained at any time between October 1 and November 15 of each year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama.

Schools—Physical education—

Obligations incurred by County Board of Education for athletic equipment to further system of physical education in public schools may be paid from general school fund.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I will thank you to advise me whether it is legal for a county board of education to use the general school funds of the county in liquidating certain claims outstanding against the county board of education for athletic equipment purchased during the year 1931-32. This inquiry is based on a request made of this Department by Mr. S. M. Tharp, County Superintendent of Education of Baldwin County, Alabama. He states that prior to October 1, 1932, matriculation fees were collected and placed in the general fund of the county and that all bills were paid from the general fund and district tax fund. However, in view of the closing of the Baldwin County Bank, which was the depository of county school funds, the amount available for expenditures of the kind named above, was impounded. The Baldwin County Bank has now been liquidated and certain moneys have become available, which if legal could be used for the payment of the equipment."

In my opinion your inquiry must be answered in the affirmative.

Section 621 of the School Code of 1927 provides:

"621. PHYSICAL EDUCATION REQUIRED — Every public school and private or parochial school shall carry out a system of physical education, the character of which shall conform to the program or course outlined by the State Department of Education."

Section 20 of the said School Code provides:

"20. PHYSICAL AND HEALTH EDUCATION, DIVISION OF.—The Division of Physical and Health Education, subject to the approval of the State Superintendent of Education, shall outline a course of physical training for the various schools of the State. It shall collect and disseminate useful data on the health of school children, and shall devise ways and means of co-ordinating the work of health education of the Department of Education, and of the county and city boards of education, with the work of the State Board of Health and with the health authorities in counties and cities."

This latter section has been repealed by Acts of 1935, page 598, but was in full force and effect in the years 1931 and 1932. Its repeal in 1935 did

not change the policy of the State relative to physical education. I know of no reason why the obligations incurred for athletic equipment procured to further a program of physical education, as required by law, may not be paid from the funds referred to in your letter of inquiry. Cf. Quarterly Report of the Attorney General, Vol. V., page 5.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. F. B. Carpenter,
Clerk & Register Circuit Court,
Clay County,
Ashland, Alabama.

The Judge of the Circuit Court when sitting in equity is given the power to adjudge and tax the cost as he may deem equitable and right under the facts involved in the proceedings and, when so judicially determined, the costs must be collected according to the judgment of the court taxing the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 14, 1936, in which you request my opinion as follows:

"In an Equity case where the Respondent answers and files a cross bill making himself respondent-cross complainant and making the complainant the complainant cross respondent, which case is judicially determined taxing the cost of said suit one half against the complainant and one half against the respondent; execution is issued against each for one-half of the cost accrued and the execution against the complainant-cross respondent is returned marked "No Property Found;" execution against the respondent-cross complainant is returned satisfied.

"Would it then be proper to issue another execution against the respondent-cross complainant for the balance of the cost or should execution then be issued against him for the balance of the cost not paid by him on the first execution that accrued at his instance."

It is my opinion in the case as stated above by you the costs must be collected as decreed by the Judge, that is, the complainant must pay one-half the cost and respondent pay one-half. From the facts as I gather them from your statement the bill of costs was judicially fixed by the court. This being true, it is my opinion it is taken out of the operation of Sections 7263 and 7806, Code of Alabama of 1923. Now, if the costs had been taxed by operation of law, that is, against the unsuccessful party.

I think the rule would be different, but when the Judge of the Circuit Court is sitting in equity he is given the power to tax costs as may seem just and proper and when he exercises this function and splits up the cost as in this case I do not believe the sections, *supra*, can intervene. I am unable to find where our courts of last resort have passed on this question but the construction, as above set out, is the only construction that can be placed on the matter in view of the facts as stated in your request.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Homer F. Mitchell,
Probate Judge,
Cullman County,
Cullman, Alabama.

Revenue Act, 1935—Sales of real estate for taxes.

1. Notice required by Section 217 (a) is sufficient if served on personal representative, in the event person making assessment dies prior to date of proceedings for tax sale.
2. When assessment is made by personal representative, notice required by Section 217 (a) must be served on him, or his successor, and publication or posting provided by Section 218 must be effected.
3. An assessment of real estate to the "estate" of a decedent will not support a tax sale.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. When a person dies after making an assessment and an administrator or executor is appointed on his estate is it sufficient to serve the notice required by section 217 of the Revenue Act of 1935 on the administrator or executor, or must the notice also be given by publication as provided for non-residents?

"2. When an assessment is made by an administrator or executor for the estate of a deceased person, is it sufficient to serve the notice on the administrator or executor making the assessment without any publication?

"3. When an assessment is made for the estate of a deceased person where no administrator or executor has ever been appointed, is it suffi-

cient to serve the notice required by this section on the party making the assessment, whoever he may be, without any publication?

"These questions are all based on the assumption that all parties are residents of the county."

Answering your first inquiry, it is my opinion that in the event a taxpayer assesses his property for taxation and thereafter dies before the taxes are paid and a personal representative is appointed to administer his estate, it is a sufficient compliance with the laws relative to the sale of land for the payment of taxes if the Tax Collector serves a notice required by Section 217 (a) of the Revenue Act of 1935 on the personal representative of the decedent.

Section 217 (b) of the Revenue Act of 1935 provides, in part:

"If the party against whom such assessment was made has since died, and letters testamentary or of administration have been granted upon his estate, such notice must, in like manner be served on his personal representatives, if a resident of the county."

Your second inquiry must be answered in the negative.

Section 217 (b), *supra* further provides:

"If the property or other subjects embraced in any assessment were returned or listed by a guardian, or other person, for a minor or person of unsound mind or by trustee for his cestui que trust, except husband or wife, or by personal representative for the estate of any deceased person, or by a public officer, receiver, or appointee of any court, such notice must in like manner be served on the party making the return, or his successor, and also by publication or posting, as provided in the next succeeding subsection."

Your third inquiry must be answered in the negative. In the event taxes are assessed to the "estate" of a decedent, for whom no personal representative has been appointed, it is not such assessment as will support a sale for delinquent taxes. *Scott v. Brown*, 106 Ala. 604, and cases there cited. Cf. Quarterly Report of the Attorney General, Vol. III, pages 202, 203.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

1. Mere non-use of corporate powers does not dissolve municipal corporation.

2. Title to property of municipal corporation, when charter is forfeited, shall vest in the county in which the municipal corporation is situated.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 28, 1937, in which you request my opinion as follows:

"Please advise what disposition should be made of automobile license money collected for a town if and when that town ceased to function as an incorporation.

"We have taken the authority to pay the same into the general fund of the county. Is that correct or not?"

I understand from you that the town in question is the Town of Fulton, Alabama, having a population of less than 1100 inhabitants; that this Town has ceased to elect a mayor and councilmen and that such councilmen are not functioning but that no steps have been taken to have the charter forfeited as provided by law.

It is well settled that a municipal corporation does not ipso facts become dissolved or forfeit its charter by non-use for any period of time. **Butler et al v. Walker et al**, 98 Ala. 358, 13 So. 361, 46 C. J. 173. In the absence of either legislative action or judicial action either dissolving a municipal corporation or forfeiting its charter, the municipal corporation remains an entity and is entitled to its property.

Under the provisions of Code Section 2330, if any municipal corporation having a population of 1100 inhabitants or less fails to elect a mayor or other chief executive for more than six months after the time fixed for such election, and for certain other causes, the municipal corporation shall forfeit its charter. Its forfeiture may be declared by a hearing before the Judge of Probate on petition of the Court of County Commissioners or any five qualified voters of the county in which the city is situation.

In my opinion some such action is necessary before the municipal corporation becomes dissolved under the above decision.

If such proceedings are taken, it is expressly provided by Code Section 2333 that the title to the property of the municipality shall vest in the

county in which such municipal corporation is situation, subject to the payment of the indebtedness of the municipal corporation. In the event such decree of forfeiture is rendered and the municipal corporation owes no debts, its property, including the funds in your hands become the property of the county and should be paid into the general fund of the county.

Yours very truly,
A. A. CARMICHAEL,

Attorney General.

June 15, 1937

Hon. W. W. Hill,
Judge of Probate,
Montgomery, Alabama.

Corporation—Code Section 6965 requiring the declaration of incorporation to contain a paragraph that corporation is not concerned with the sale of or traffic in prohibited liquors or beverages not repealed by Alabama Beverage Control Act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Sub-section (8) of Section 6965 of the Code of Alabama provides that no Probate Judge shall receive a certificate of incorporation for the organization of any mercantile, beverage, transfer company, etc. unless it contains a paragraph that it shall have no right, power of authority to manufacture, sell, keep for sale or otherwise dispose of or store, warehouse, deliver or transport any prohibited liquors or beverages, or to be in any wise concerned in the traffic therein, unless it be a declaration to organize a bona fide drug company etc.

"Will you please advise me: (a) As to whether this section is repealed by the Alabama Beverage Control Act: (b) As to whether or not a corporation expressly formed for the purpose of dealing in beer, wines or whiskey under the Alabama Beverage Control Act is exempted from inserting such clause in its certificates: (c) If the above mentioned section is repealed only in part, please advise me as to the parts which are repealed by the enactment of the Beverage Control Act and which parts are still in effect."

Answering your inquiry I call your attention to that part of Sub-Section (8) of Section 6965, as pertinent which provides as follows:

"**** If the corporation is a mercantile or beverage company, transfer company, traffic company, transportation company, warehouse company, or other like corporation, the declaration of incorporation shall

contain a paragraph to the effect that the corporation to be organized shall have no right, power or authority, to manufacture, sell, keep for sale, or otherwise dispose of, or store, warehouse, deliver or transport any **prohibited liquors or beverages** or to be in any wise concerned in the traffic therein, unless it be a declaration to organize a bona fide drug company, which must state that it has no right, power or authority to sell or keep for sale, or offer for sale any **prohibited liquor or beverage except** alcohol in the quantity and subject to the restrictions prescribed by the state law, * * * " (Emphasis supplied).

In my opinion the foregoing provision is not repealed by the provisions of the Alabama Beverage Control Act, approved (H. B. 44, Special Session, 1936-37). The effect of said Act is merely to change the legal definition of the terms "prohibited liquors or beverages."

You will note the provisions of the foregoing section required a paragraph in the declaration of incorporation to the effect that the corporation in question will not sell or traffic in, etc., "any prohibited liquors or beverages". The Alabama Beverage Control Act, of course, legalizes certain alcoholic beverages in the so-called "wet" counties but there still are certain "prohibited" beverages, and sub-section (8) of Section 6965 therefore has a distinct field of operation. For instance, Section 51, on page 50 of the pamphlet edition of the Alabama Beverage Control Act provides as follows:

"In all Counties of the State it shall be unlawful for any person, firm or corporation to have in his or its possession any still or apparatus to be used for the manufacture of any alcoholic beverage of any kind, or any alcoholic beverage of any kind illegally manufactured, or transported, within the State, or imported into the State from any other place without authority of the Alcoholic Control Board of the State, and any person, firm or corporation violating this provision or who transports any illegally manufactured alcoholic beverages, or who manufactures illegally any alcoholic beverages, upon conviction shall be punished as now provided by law."

You will note that the alcoholic beverages so illegally manufactured or transported would be "prohibited liquors or beverages" within the meaning of Sub-section (8) of Section 6965, supra. It is not undertaken here to enumerate all of the possible applications of said Sub-section (8), but they will occur to you from a reading of the Alcoholic Beverage Control Act.

Premises considered, I therefore advise you that Sub-section (8) of Section 6965 is in no way repealed by the Alabama Beverage Control Act, the only change being in the definition of the term "prohibited liquors or beverages."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Motor Vehicle Trailers—License—Revenue Act 194, Acts of 1935,
Schedule 158.11.

License fee for trailer and semi-trailer is one-half of license
fee, at time of purchase, for motor vehicle by which it is drawn.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your request which I quote as follows:

"The last Revenue Act specifies that the price of a trailer tag shall be one-half of the price of the tag on the vehicle which draws the trailer.

"We have an application for a trailer tag to follow a 1½ ton truck. The trailer is new but the truck has been in operation since October of last year and the price of the tag now on the truck was \$23.00. The price of a tag for the truck if bought now would be less than half this amount. Please advise us if we should collect one-half the price of the truck tag for a full year, or should we collect one-half the price of a truck tag if bought now."

I refer you to Schedule 158.11 which is as follows:

"Schedule 158.11. Every small trailer and semi-trailer shall pay a license tax of fifty per cent (50%) of the cost of the license tax of the motor vehicle by which it is drawn. The purchaser shall specify the truck to which it is to be attached and shall pay one-half (½) of the amount of that license. Each semi-trailer tag shall bear the same tag classification corresponding in capacity to the truck tag of the truck to which it is to be attached. Trailers of any kind or description for hauling passengers for hire are prohibited by law ***."

It is my opinion that the legislature intended that the cost of a tag for a trailer should be based upon the cost of a license tag for the vehicle drawing the trailer as of the date of the purchase of the trailer tag and not as of the date which the tag for the motor vehicle drawing the trailer was originally purchased. In other words, it was the intention of the legislature to permit a proportionate reduction in the cost of the trailer tag as was granted in the cost of the tag for the motor vehicle drawing the trailer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 15, 1937

Hon. Chas. E. McCall,
State Auditor,
Capitol.

Where an officer defaults and his bond is not sufficient to take over all the different interests involved in his defalcation, the proceeds of the bond should be properly apportioned.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 4, 1936, in which you request my opinion as follows:

"Where a Circuit Clerk has an official bond in the sum of \$3500.00, and on examination by an Examiner of Accounts it is found that he is due the State \$2000.00, and due the County \$2000.00, and due to the Sheriff of his County the aggregate sum of \$1000.00, or a total of \$5,000.00 and the surety on the bond wishes to discharge itself from all liability, and wishes to pay to the State of Alabama \$3500.00, to be applied to the obligations of the bond, should the amount of \$3500.00 be ratably distributed among State, County and Sheriff in due proportions to the amounts due on said bond?

"Please refer to 230 Ala. p. 515, State vs. Alabama Power Company, and to the Biennial Report of the Attorney General, 1922-24, p. 174."

I am of the opinion the proceeds of the bond should be apportioned according to the various interests. I call your attention to the case of **State v. Alabama Power Company**, 230 Ala. 513. In fact the provision of the decision we are quoting below was the holding of the Circuit Court and adhered to by the Supreme Court in this case. The part of the decision which I refer to is as follows:

"The trial court ruled that the rights of the parties were governed by the provisions of section 2612 of the Code, which provides: 'Every official bond is obligatory on the principal and sureties thereon—1. For every breach of the condition during the time the officer continues in office, or discharges any of the duties thereof. *** 3. For the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or the improper or neglected performance of those duties imposed by law. 4. The words, 'For the use and benefit of every person injured', as used in subdivision three, shall include all persons having a direct and proximate interest in the official act or omission and all persons connected with such official act or omission by estate or interest'; that the liability of the surety is purely statutory, and the statute by necessary implication precludes the application of the common-law doctrine of 'prerogative right of preference' to the fund deposited in court by the surety in discharge of its liability, and the claimants must share ratably in its distribution."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 17, 1937

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Motor Vehicle License — Revenue Act No. 194, p. 256, Schedule 158.16. State Tax Commission required to collect \$1.00 for each motor vehicle tag sold to replace lost, mutilated or destroyed tag.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your communication which is quoted as follows:

"Will you please advise if under Schedule 158.16, this office is correct in charging \$1.00 each for the front and the rear for each replacement tag issued replacing the original lost, stolen or mutilated tags. Section 158.16 reads as follows:

"It shall be unlawful for any person to mutilate or alter for the purpose of deception any motor vehicle tag provided by this Act. It shall also be unlawful for any person to use upon his car any tag in imitation or substitution for real tags lawfully used. It shall be the duty of all sheriffs, police officers, license inspectors and other officers to arrest persons violating these two preceding provisions, and a fine of not less than five dollars (\$5.00) and not more than one hundred dollars (\$100.00) may be imposed for each offense. In case the tags or either of them become mutilated beyond recognition, the owner of the vehicle may file with the State Tax Commission an affidavit setting forth the fact that the tags or one of them has been lost, mutilated or destroyed and upon payment of one dollar (\$1.00) (for each tag) and the surrender of the tag or tags so mutilated or destroyed, new tags shall be issued to the owner by the Commission. In case of mutilated tags the same shall be forwarded with affidavit to the Tax Commission and should lost tag come into his possession it shall be the duty of the person coming into the possession of the tag to immediately forward the old tag to the State Tax Commission. Should he, or any one else use upon any motor vehicle the old replaced tag or tags he shall be fined twice the amount of the license required for motor vehicles upon which the tag is used and shall also be required to procure a license for said motor vehicle. Anyone who makes a false affidavit in obtaining tags from the State Tax Commission shall be guilty of perjury. Justices of the Peace and Inferior Courts with like jurisdiction shall be authorized and shall have jurisdiction for violation of the motor vehicle laws except in the case of felonies."

It is my opinion that Schedule 158.16, supra, requires you to collect \$1.00 for each motor vehicle (single) tag which you sell to replace a lost, mutilated or destroyed tag. You would not be authorized to sell two motor vehicle tags to replace lost, mutilated or destroyed tags for the price of \$1.00, but you are required to collect \$2.00 therefor.

I specifically direct your attention to that portion of the Act quoted in your letter which says: "In case the tag or either of them become mutilated beyond recognition, the owner of the vehicle may file with the State

Tax Commission an affidavit setting forth the fact that the tags or one of them has been lost, mutilated or destroyed and upon payment of one dollar (\$1.00) (for each tag) and the surrender of the tag or tags so mutilated or destroyed, new tags shall be issued to the owner by the Commission". You will observe that this quoted provision uses both a singular and plural reference to motor vehicle tags and specifically states that \$1.00 shall be charged for each tag. The language employed indicates a clear intention on the part of the Legislature that dual tags should not be construed to mean a single tag and thus permit two tags to be obtained for the price of one.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 17, 1937

Hon. Baynard L. Malone,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Fees—Probate Judge not entitled to a fee for noting the change of ownership of automobile tags on the license record, as there is no law authorizing said fee.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Under Schedule 158.14 (a) the provision is made for the transfer of a license tag from one owner to the new or successive owner of a motor vehicle.

"Under Section 358 (b) you will find the following provision:

"A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the Probate Judge originally issuing such license and the payment of a fifty cent fee."

You request my opinion as follows:

Is a Probate Judge entitled to a fee for the transfer of licenses on automobiles upon change of ownership?

In my opinion, your inquiry should be answered in the negative.

There is no provision authorizing the transfer of motor vehicle licenses, as the licenses remain on the vehicle and follow the same and cannot be transferred.

Section 158.14 of the 1935 Revenue Act does not authorize the transfer of a motor vehicle license but only provides for the change of ownership being noted by the Probate Judge on his record of licenses.

I have been unable to find any law authorizing the payment of a fee to the Judge of Probate for noting the change of ownership of automobile tags on the license record.

An officer claiming a fee must point to specific authority giving him such fee.—Quarterly Report of Attorney General, Vol. 1, p. 221, Vol. III, p. 159.

Section 7255 of the 1923 Code of Alabama, provides as follows:

"Section 7255. NO FEE CHARGED UNLESS EXPRESSLY AUTHORIZED. —The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

Section 358 of the 1935 Revenue Act, provides as follows:

"Section 358 (a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license, and shall not be exercised except by the person, firm or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the Probate Judge originally issuing such license and the payment of a fee of fifty cents."

After considering all of the section, supra, it is my opinion that this section has no bearing on the question involved, as this section is applicable only to the transfer of a license for a business or privilege and not for noting the change of ownership of automobile tags on the license record.

The premises considered, it is my opinion that a Probate Judge is not entitled to a fee for noting the change of ownership of automobile tags on the license record, as there is no law authorizing said fee.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 17, 1937

Honorable E. J. Harris,
Tax Assessor,
Lawrence County,
Moulton, Alabama.

Motor Vehicles—Taxation.

1. Automobiles brought into the State of Alabama after last Monday in February and before October 1, 1937, are subject on and after October 1, 1938 to assessment and payment of ad valorem taxes as of October 1, 1937.

2. Used automobiles owned by City of Sheffield on October 1, 1936 and sold to individuals prior to October 1, 1937, subject on and after October 1, 1938 to assessment and payment of ad valorem taxes as of October 1, 1937.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which I quote as follows:

"Please advise me whether or not April the first is the earliest date a person can purchase a new car and be exempt taxes the following assessment.

"Please advise me whether or not there is tax due on used trucks formerly owned by the City of Sheffield and was purchased April the twentieth by a person."

If the automobile mentioned in your letter was brought into the State of Alabama after the last Monday in February and before October 1, 1937, it would be subject to assessment and payment of ad valorem taxes as of October 1, 1937.

The used automobiles which were used by the City of Sheffield on October 1, 1936 and sold to an individual thereafter and prior to October 1, 1937, would be subject to assessment and payment of taxes as of October 1, 1937.

Reference is made to Schedule 158.12 of Act 194, page 256, General Acts of Alabama, 1935, from which I quote as follows:

"To prevent motor vehicles within the meaning of this act, from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same, no license shall be issued to operate the motor vehicle on the public highways of this State nor shall any transfer be made by Probate Judge as provided by this act, until the ad valorem tax on such vehicles shall have been paid in the county for the preceding year, as evidenced by a receipt of the tax collector, where the owner of said vehicle resides, if the vehicle is owned by an individual***.

"Every person, firm or corporation who desires to operate a motor vehicle on the public highways of Alabama, shall first return such motor vehicle for ad valorem taxes to the tax assessor of the county in which he resides, for the preceding year and the tax assessor of this county shall deliver to such person who makes the return as herein required a certificate of assessment on form provided by the State Tax Commission, and such certificate shall be the warrant of the tax collector to collect the tax as shown thereon.

"(c) *** Motor vehicles brought into this State after the first of October and before the tax assessor has completed his assessment shall be subject to taxation, the same as if it had been held or owned in the State on the first day of October."

Automobile ad valorem taxes are assessable and payable at the same time, but for the preceding year. Opinion of the Attorney General, Quarterly Report Vol. 1, page 261. The purchaser of an automobile which was brought into this State after the last Monday in February of 1937, would not have to pay any ad valorem taxes on the car before he purchases his 1939 tag, on or after October 1, 1938, and the taxes assessed and paid at that time would be for the tax year 1937-38—the preceding year.

The purchaser of the automobile from the City of Sheffield, would have to pay no ad valorem taxes until he purchases his automobile tag for the year 1939, which is required to be purchased on and after October 1, 1938 and prior to November 15, 1938. The taxes which the purchaser pays at that time would be for the year 1937-38. There were no ad valorem taxes assessed against the car or due to be assessed for the year 1936-1937 for the reason that the property was owned by the City of Sheffield on October 1, 1936. Sale of the car after October 1, 1936 to an individual did not deprive the car of its exemption status on October 1, 1936. The exemption status continued throughout the tax year. No tax lien attached before October 1, 1937. As I have already stated, the assessment made and the taxes paid on and after October 1, 1938 cover the taxes for which a lien attached October 1, 1937.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 19, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Sheriff or deputy who transfers a person to the insane hospital is entitled to actual expense. No provision for per diem. The sheriff for arresting and placing an insane person in jail is not entitled to a fee for the arrest unless the party is charged with a criminal offense.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 4, 1937, in which you request my opinion as follows:

"When a Sheriff is deputed to remove an insane person to the State Asylum is he entitled to all expenses and a per diem of \$3.00 per day?

"Unless the judge or jury so orders can a guard be paid expenses and per diem of \$2.00?

"In his claim against the county for expenses regarding taking, confining and removing an insane person can the Sheriff charge the County an arrest fee or guard fee?"

I find no authority of law for paying anyone deputized by the Judge of Probate their per diem for transporting an insane person to the hospital. The only statute I am able to find is Section 1445, Code of Alabama, 1923, which is as follows:

"Conveying patient to hospital—The Judge of Probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

You will note the above statute says:

"all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury."

The term "all expenses" does not, in my opinion, include per diem.

Answering your second request, I call your attention to an opinion of this office of March 11, 1935, to Hon. Frank O. Deese, Judge of Probate, Dale County, which answers this part of your request fully.

Answering your third inquiry, unless the defendant is charged with the crime, I know of no way the sheriff could be paid an arresting fee. Biennial Report of Attorney General 1926-28, p. 319.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1937

Hon. Claude T. Cotton,
Judge Court of Common Pleas,
Houston County,
Dothan, Alabama.

1. Court of Common Pleas of Dothan, Alabama — Has no jurisdiction of traffic law violations outside Precinct 3, Houston County.

2. Justices of the Peace and the courts of like jurisdiction have final jurisdiction over highway violations.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your inquiry of recent date in which you request my opinion as to whether you have jurisdiction of traffic law violations outside of your beat. I also have your subsequent inquiry as to whether you have jurisdiction of traffic law violation instituted by State traffic police.

1. Your first inquiry should be answered in the negative. The Act establishing the Court of Common Pleas of Dothan, Alabama, (Local Acts, 1923, page 288) provides that said court shall have the same jurisdiction as previously conferred upon the Justices of the Peace in Precinct 3, Houston County. The territorial jurisdiction of the Justices of the Peace is provided by Section 3846, Code of 1923. Subject to the exceptions there noted, the territorial jurisdiction of the Justices of the Peace is limited to the precinct for which they are appointed. Since your jurisdiction is the same as that of Justices of the Peace, in my opinion, you have no jurisdiction of traffic law violations outside of your beat, except as specifically provided by Section 3846 of the Code of 1923.

2. Your second inquiry is as to whether you have jurisdiction of traffic law violations within your precinct. The Alabama State Highway law provides, Section 104, that upon the arrest of any person, the officer making the arrest can admit him to bail upon the person's giving bond. If the person does not give bond to appear, then the officer is directed to take him immediately "before the nearest or most accessible Magistrate." Section 105 of the Act p. 390 requires Justices of the Peace to keep a full report of every case of violation of the State Highway Act, and sub-section B of Section 105 provides that among the information sent to the State Department by the Justice of the Peace trying the case shall be "all necessary information as to the parties to the case, the nature of the offense, the date of hearing the pleas, the judgment, the amount of the fine or forfeiture, as the case may be," etc.

In my opinion these two sections require the conclusion that Justices of the Peace have final jurisdiction of traffic law violations. The requirement of Section 104, that the person arrested be taken before the nearest or most accessible Magistrate, is not restricted for a mere preliminary hearing. The requirement that Justices of the Peace make reports of the pleas, the judgment, and the amount of fine, is also incompatible with a holding that Justices of the Peace have only preliminary jurisdiction. If the Justice had only preliminary jurisdiction of violations of the Highway Act, he could not assess any fine, and his only power would be to hold the defendant under bond to the Grand Jury or to discharge him.

Construing the entire act therefore, it is my opinion that Justices of the Peace and your court with jurisdiction equal to that of Justices of the Peace, have final jurisdiction of traffic law violations.

Previous opinions of this office to the contrary are hereby expressly overruled, including Biennial Report of the Attorney General, 1926-28, page 445, 446, 696 and 698 and all other published and unpublished opinions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1937

Hon. Gaston Scott,
President, Highway Department,
Montgomery, Alabama.

Vehicle designed to be attached to, and having its front end supported by, a motor truck, but not designed for carrying freight or merchandise is not classified as a semi-trailer in Schedule 158 of the Revenue Act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of April 16, 1937, in which you request my opinion as follows:

"I am handing you herewith picture of an outfit owned by a citizen of Montgomery. Some question has arisen as to the proper classification and legality of its use on the highways of this state.

"A description of the outfit is as follows: The semi-trailer or house-trailer is seven feet wide, approximately twenty-seven feet long, ten feet high. It weighs approximately 2500 or 3000 pounds. It is designed to be propelled by a truck and a Ford V-8 Truck is used for that purpose.

"Please advise if this outfit should be classified as a semi-trailer, it being designed to be attached to and having its front end supported by a motor truck, but is not designed for the carriage of freight or merchandise. Or should this outfit be classified as a house-trailer, the compartment on said outfit being designed as a living compartment, being equipped with bed rooms, kitchen, toilets, etc.

"Under either classification is there any law in this state that would prohibit this outfit being propelled by a truck when said truck complies with all laws governing its use on the highways.

"This outfit is used by its owner for recreational purposes."

In my opinion, said outfit should be classed as a semi-trailer under the provisions of Revenue Code, Schedule 158. The applicable parts of said Schedule are as follows:

"(1) 'Semi-Trailer': Any vehicle designed to be attached to, and having its front end supported by, a motor truck or truck tractor, and intended for the carrying of freight or merchandise and with a load capacity of over 1,000 pounds."

You will note that this definition of a semi-trailer applies only to "vehicles intended for the carrying of freight or merchandise". Since such outfit described by you is not intended for the carrying of freight or merchandise it cannot be classified as a semi-trailer. It appears from the facts as set out in your letter that the outfit is properly classified as a house-trailer.

There is no law in this State which would prohibit this outfit being propelled by a truck when said truck complies with all laws governing its use on the highways. The dimensions set out in your letter do not exceed the permissible dimensions under the Highway Code as amended by the Acts of 1932 Extra Session, page 69.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 21, 1937

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Where a party is convicted in the county courts for operating a motor vehicle while intoxicated and his license to drive motor vehicles is cancelled and he appeals his case to the Circuit Court, such cancellation is not operative while said case is pending in the circuit court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 14, 1937, in which you request my opinion as follows:

"Please give me an opinion on the following. When a party is convicted in County Court on the charge of driving an automobile while intoxicated and his driving license is revoked and he takes an appeal to Circuit Court is he permitted to drive an automobile during the time he is awaiting for his case to be tried in Circuit Court. Please give me your reply as soon as convenient.

My answer to your request is in the affirmative. When a person is convicted as stated in your request, and appeals to the Circuit Court, he is here tried without any reference to his former trial in the County Court.

In other words, the case in the Circuit Court is tried de novo. This is provided by Section 3843 of the Code of Alabama of 1923, which is as follows:

"3843. Trial of appeal de novo; statement of cause of complaint—The trial in the circuit court shall be de novo, and without any indictment or presentment by the grand jury; but the solicitor shall make a brief statement of the cause of complaint signed by him."

Boyd vs. State, 132 Ala. 23. Therefore, the order of the county court revoking the license to operate a motor vehicle is suspended pending the outcome of the appeal to the Circuit Court and to make the revocation effective such order would have to be made by the Judge of the Circuit Court on conviction as the case here is tried de novo.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 26, 1937

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Taxation—H. B. No. 259, General Acts, 1936-37 Special Session, approved February 3, 1937, construed.

1. Real estate sold for ad valorem taxes and bought in by the State at any time prior to January 1, 1935, may be redeemed by any lawfully authorized person in four equal annual installments without interest or penalty, provided the State has not parted with its title as provided by law.

2. (a) Application for redemption shall be filed with the Probate Judge of the County where the land sought to be redeemed is situated, and must be approved by the State Land Commissioner.

2. (b) Applicant who seeks to redeem should file one application addressed to the Probate Judge who shall forward the same to the State Land Commissioner for approval.

3. Act No. 49, General Acts, 1936, page 27, amending Section 291, of the Revenue Act of Alabama, 1935, expired December 31, 1936.

4. The Act of February 3, 1937, *supra*, authorizes redemptions by payment of any amount in multiples of one fourth of redemption charges originally due.

5. (a) Title to the land which is redeemed passes to redemptioner on payment of first installment subject to lien of State for subsequent installments.

5. (b) Redeemed property should be assessed during installment period and subsequent years,

6. Section 294, (General Acts, 1935, page 378) offers alternative plan of redemption.

7. Section 277, (General Acts, 1935, page 372) has application to redemptions perfected under H. B. 259, *supra*.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of February 23, 1937, which I quote as follows:

"Please give me your opinion on the meaning of, effect of, and procedure to be followed in carrying out the provisions of House Bill 259, approved February 3, 1937.

"I have compared House Bill 259 with the Act of March 26, 1936, (G. A. 1936, page 27) and have noted several points on which these two Statutes appear to vary. Attached is a comparison of the two above mentioned Statutes, marked by underlining, to show changes.

"Please give me an answer to the following questions so that I may be in position to handle correctly redemptions under House Bill 259.

Ques. 1 The Act approved March 26, 1936 contained the following words: "All persons having the right to redeem, shall have four years from date of sale to redeem . . ." The Act approved February 3, 1937, apparently does not contain this provision. Does this mean that all lands bought in by the State prior to January 1, 1935, and still in possession of the State, can be redeemed in quarterly payments without interest and penalties?

Ques. 2 The Act of March 26, 1936, contained the following words: " . . . the same to be approved by the State Land Commission, . . . "; whereas the Act approved February 3, 1937, contained the following words: " . . . shall, . . . make application to the State Land Commissioner and to the Probate Judge . . . "

Ques. 2 (A) Do you interpret this provision to mean that applications under the Act of February 3, 1937, shall be filed with the Probate Judge and subsequently approved by the State Land Commissioner as heretofore?

Ques. 2 (B) Shall an applicant make one application addressed to both the State Land Commissioner and the Probate Judge and shall the Probate Judge upon receiving such application forward same to the State Land Commissioner as heretofore, or shall some separate and distinct procedure be followed?

Ques. 3 Did the Act of March 26, 1936, expire December 31, 1936, or was it repealed by the Act of February 3, 1937, or is any part thereof still in effect?

Ques. 4. Is the February 3, 1937, Act mandatory as to the payment of **one-fourth of said sum annually**, or may a person redeeming pay in any multiple of one-fourth oftener than annually if he desires to do so?

Ques. 5 (A) Does the title to land being redeemed pass to the person redeeming upon payment of the first installment?

Ques. 5 (B) If the title passes out of the State, subject to a lien for the unpaid installments, shall the person assess for taxes for the subsequent years, particularly those years during which installments on the redemption are being paid?

Ques. 5 (C) If the title does not pass out of the State to the person redeeming are there any taxes accruing subsequent to the first installment on redemption and prior to the final installment on redemption?

Ques. 6. How is Section 294 (G. A. 1935, page 378) construed in reference to the Act of February 3, 1937?

Ques. 7. How is Section 277 (G. A. 1935, page 372) construed in reference to the Act of February 3, 1937?

Question No. 1 in your letter should be answered in the affirmative. The Legislature of Alabama incorporated in the Revenue Act of 1935 Section 291 which was amended by Act No. 49, General Acts 1936, page 27. This Act in its original form and as amended offered a plan of redemption for land sold to the State of Alabama prior to January 1, 1935, provided such sale took place within four years prior to the date of redemption. It is quite apparent after reading Section 291 as amended and H. B. 259, approved February 3, 1937, which is the subject of this opinion that the Legislature intended by the last named Act to extend the period in which applications may be filed through January 1, 1938. As hereinafter stated in this opinion, Section 291 supra, as amended, expired on December 31, 1936, but H. B. 259 offers the same plan of redemption for another year, but leaves out all limitations of time from the date of the tax sale to the date of redemption. The absence of such provisions clearly indicates that it was the intention of the Legislature under H. B. 259, supra, to permit redemption under the terms of the Act, of any real estate sold at any time prior to January 1, 1935, and that it was not the intention to limit or to circumscribe the redemption to land sold to the State within four years of the redemption. I therefore hold that real estate sold for ad valorem taxes and bought in by the State of Alabama at any time prior to January 1, 1935, may be redeemed by any lawfully authorized person, in four equal annual

installments, without interest or penalty, provided, however, that the State of Alabama has not parted with its title in the manner provided by law.

Answering question 2 (a), it is my opinion that the application for redemption should first be filed with the Probate Judge of the County, where the land sought to be redeemed is situated, and thereafter, the State Land Commissioner may approve the same. The Act provides that any person having the right to redeem and who desires to redeem from the State, shall make application to the State Land Commissioner and to the Probate Judge of the County where the real estate is situated. If the procedure outlined in this application shall be made to the State Land Commissioner and the Probate Judge will be fully met.

With reference to Question 2 (b), it is my opinion that the Act requires the applicant to file only one application addressed to the Probate Judge, whose duty it is upon receipt of such application to forward the same to the State Land Commissioner for his approval.

Question 3. It is my opinion that Act No. 49, General Acts, 1936, page 27, amending Section 291, Revenue Acts of Alabama, 1935, expired December 31, 1936. The wording of the Act indicates that it was the intention of the Legislature that the authority granted in said Act should not extend beyond December 31, 1936.

Question 4 of your letter presents a matter upon which an opinion of this office has already been rendered. Quarterly Report, Attorney General, Vol. 1, page 207. This opinion refers to the provisions of Section 291, Revenue Acts of Alabama, 1935, and amended by Act 49, General Acts, 1936, page 27. There is such a striking similarity and identity between the provisions of Section 291, supra, and H. B. No. 259, supra, as to the time and manner in which the installments may be paid, that I feel no hesitancy in adopting as a part of this opinion a portion of the opinion as follows:

"Does this permission to pay without interest apply to parties who desire to redeem in cash and not avail themselves of the four years partial payment plan? The unreason of charging a person interest who pays cash and not requiring interest of a person who takes four years to pay argues more strongly that it does. On the other hand, it has been pointed out that the statute provides that the party redeeming shall deposit one-fourth of the amount required and 'annually thereafter shall pay, etc.' This has been argued to be a mandatory requirement that such payment shall be annual and that in order to be exempted from the payment of interest the partial payment plan with payments on an annual basis must be strictly followed.

"I am not convinced that so strict a limitation can be placed on the language. In the first place, language is 'may pay.' This is clearly permissive. The parties 'shall have four years'. This is an outside limitation. I think, not a specific command that such parties must take four years whether they so desire or not. The words 'annually thereafter' do not convey to my mind an absolute requirement that the payments must be annual and can be made in no other way. Coupled with Section 292, it appears to me that unless a party makes the quarterly payments at least annually, he will be in default. I do not think the Legislature intended to say to a redemptioner: 'If once you elect to follow the partial payment plan, you cannot pay up all the installments and release

the property entirely except by making a payment of twenty-five per cent (25%) annually.' Such a conclusion is opposed to sound logic as well as the purpose sought."

"It is therefore, my conclusion that as to property sold to the State for taxes prior to January 1, 1935, *** redemption is authorized by Section 291 without the payment of interest and this is true whether such redemption be for cash or on the partial payment plan. I think further that should a person paying the first installment desire to complete his payments in less time than allowed, he has that right, though such payment must be in multiples of one-fourth of the total amount originally due."

I, therefore, conclude that the Act of February 3, 1937, authorizes redemption payments of any amount in multiples of one-fourth of the redemption charges originally due. Such anticipation may be made without the payment of any interest or penalties that are waived when redemption is effected through one-fourth annual installments.

Referring to Question 5 (a), it is my opinion that the title to the land being redeemed passes to the redemptioner on payment of an amount equal to not less than the first installment. This title passes subject to a lien of the State for subsequent installments. If you will refer to an opinion of this office to Hon. Roy Johnson, Tax Assessor, Birmingham, Alabama, reported in Volume II, Quarterly Report of the Attorney General, page 205, you will find that in construing Section 291 of the Revenue Act of 1935, which Section contains words of similar import to those under consideration at the present time, I held that "Where party redeems from tax sale to the State under installment plan authorized by Section 291 of the 1935 Revenue Act, he should assess and pay the taxes for all years subsequent to such redemption." I further held, after quoting Section 292 of the Revenue Act of 1935, as follows: "It is to be noted that the State shall have a 'lien' for unpaid installments. This would indicate that there is a conveyance to the redemptioner with a lien similar to a vendor's lien reserved, and not merely an option to purchase or redeem on payment of the balance due." I further quote as follows: "This is further emphasized by the specific manner in which foreclosure is provided for and the ultimate sale to the State. There is even a provision for a deed to the State upon such foreclosure." Again, I quote from the opinion: "The conclusion that I reach from both the sections read together is that upon making the installment payment required, the lands pass back to the redemptioner and hence it is his duty to annually assess and pay the taxes thereon for the years subsequent to such redemption. He must, of course, also make the balance of the installment payments to avoid foreclosure as provided by Section 292."

Act No. 49, which is under consideration in this opinion, reads, in part as follows: "Whenever any real estate has prior to January 1, 1935, been sold for taxes and bid in by the State at tax sale, the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions shall apply: 'All persons having the right to redeem, such redemption shall be made as in other cases, except that the parties desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties.'"

Your attention is called to the following expressions used in the preceding quotation: "The same may be redeemed in the same manner," "All

persons having the right to redeem," "Such redemptions shall be made as in other cases, except that the parties desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties."

The following quotations from the opinion of February 26, 1936, to Hon. Roy Johnson, Vol. 1, page 207, are pertinent.

"Without more, the foregoing would very clearly indicate that so far as passing the title from the State to the redemptioner, the same legal effect is intended by the installment payment as if the redemption money had been paid in full."

I now wish to direct your attention to Section 292, Revenue Act of 1935, page 378, which reads as follows:

"Section 292. The State of Alabama shall have a lien for all unpaid partial payments as well as for taxes for any subsequent year, and in case of the failure to pay any one of said installments together with the taxes for any subsequent year, either or both, the State Land Commissioner for and in the name of the State of Alabama, shall at his option declare all said installments due and payable at once. In case of default in payment of any installment or of any subsequent taxes, the State Land Commissioner in the name of the State shall have a right to file a bill in equity to foreclose the lien of the State, and in such suit all parties at interest shall be made parties defendant. Such suit shall be filed in the County where the land or the major portion thereof is situated. The court shall determine what amount, if any, of such taxes or installments are illegal, and in its final decree shall determine the total amount due on such installment payments, and any unpaid subsequent taxes, and shall render judgment therefor which shall include costs and shall order the property sold to satisfy the decree in the same manner as in the foreclosure of mortgages on real estate in the Court of Equity. If at such sale no one bids a sufficient sum to pay the full amount of the decree, the officer conducting the sale shall announce that the real estate is sold to the State of Alabama for the amount of the decree, interest and costs, and the sale shall be reported to the Court and be confirmed and a deed made to the State of Alabama, and the State shall be entitled to a writ of possession. The purchaser at such sale, including the State shall be entitled to a deed, and the same processes and remedies to obtain possession of the premises as in other suits where land is sold under order of a court of equity, and the title to the land conveyed by such deed shall be indefeasible as to all parties defendant in the action."

If it was not the intention of the Legislature that the redemptioner, upon payment of the first installment or of an amount of not less than the first installment, should acquire title to the property redeemed subject to the lien of the State, then Section 292, supra, would not have a field of operation. This Section prescribes the procedure that the State of Alabama shall take to recover the land upon which there is a debt due the State for installment taxes. Such procedure in my judgment assumes that the redemptioner has acquired title to the property, and I do not doubt it was the intention of the Legislature that title to the property passed to the redemptioner upon payment of the first installment or a sum equal thereto.

I refer to your Question 5 (b). If the redemptioner acquired title to the property, as I have already held in the foregoing paragraph that he has, it is his duty to assess the property during subsequent years and to pay taxes thereon.

Responding to Question No. 6 in your letter, it is my opinion that Section 294 (General Acts, 1935, page 378) offers an alternative plan of redemption. The Probate Judge therefore could permit redemptions without regard to the provisions of House Bill 259, supra.

Question No. 7 in your letter. It is my opinion that Section 277 (General Acts 1935, page 372) also has application to redemption perfected under H. B. 259, supra. The Probate Judge, in my opinion, after the first installment is paid, should observe the mandates contained in that Section. The tax assessor should also comply with the provisions thereof.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. H. R. Molton,
Commissioner, Fourth District,
Clarke County,
Jackson, Alabama.

Unemployment Compensation — Federal Unemployment Compensation Tax—

1. Employees of counties held not subject to taxes provided for by Federal Social Security Act, Title VIII.
2. County Commissioners held not subject to tax as provided for by Federal Social Security Act, Title VIII on their compensation for services as County Commissioners.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"With reference to the Federal Security Act, title VIII, I wish your opinion as to the following:

"(1) Are employees of Counties, specifically men employed as laborers on the public road of the County, subject to this tax?

"(2) Are County Commissioners subject to this tax on their compensation for services as County Commissioners?"

In reply I wish to advise you that Title VIII of the Social Security Act to which you refer in your request, in my opinion does not include a tax upon the services of employees of the State or any political sub-division thereof nor does the Social Security Act impose a tax upon the services of the County Commissioners.

I refer you to Section 811 (b) of the Social Security Act, which provides in part as follows:

"The term 'employment' means any service * * * except-

"(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

"(7) Service performed in the employ of a State, a political sub-division thereof, or an instrumentality of one or more States or political subdivisions; * * *"

You will note that the exemptions here provided are applicable to States or any political subdivision thereof, or an instrumentality of one or more States, or political subdivisions. The County is clearly not an independent governmental entity yet it is by its very nature a phase of municipal corporation which, of necessity, possesses some governmental qualities of the State and is a political subdivision of the State. I wish to refer you to Words & Phrases, 3rd Series, Vol. 2, pages 574, 575, for numerous authorities defining a county as a political subdivision of the State of which the county is a part.

It is a well established principle of constitutional law that the State and the Federal governments are limited in their power to levy taxes on each other's functions. In the famous case of **McCulloch v. State of Maryland et al** (1819), 17 U. S. 315, the Supreme Court of the United States in holding unconstitutional and void a tax upon the operation of the Bank of the United States said:

"Both indicate * * * the State has no power, taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Likewise, it has been held that the Federal government may not impose taxes on the government of the States. I refer you to the case of **Collector v. Day** (1870) 11 Wall. 113.

"The reason for immunity is based on the necessary protection of the independence of the national and state governments within their respective spheres and under our constitutional system."

Wanless Iron Co. v. Commission (1935) 75 Fed. (2d) 779, citing **Helvering v. Powers** (1934) 55 Sup. Ct. 171, 173.

Not all agencies of the State or Federal government are immune from taxation. Generally the activities of a government are divided into two classes, those which are governmental in nature and those which are pro-

proprietary or private in nature. The former are free from taxation by another sovereignty, the latter are not. The principle is clearly expressed in the following excerpt from *Metcalf & Eddy v. Mitchell* (1926) 269 U. S. 514:

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other can not be stated in form of universal application. But this court (United States Supreme Court) has repeatedly held those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. Thus the employment of officers who are agents to administer its laws (*Collector v. Day*, 11 Wall, 113; *Dobbins v. Commissioner of Erie County*, 16 Pet. 434) * * * are all so imminently connected with the necessary functions of government, as to fall within the established exemption; * * *."

"As cases arise lying between the two extremes if it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experiences show that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reasoning upon which the rule rests, and which must be the guiding principle to control its operation. If origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limit of the state; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other."

It is clear then, that, irrespective of whether or not any specific exemption is made, neither the states nor the federal government may tax wages paid by a government or its agency or instrumentality or a political subdivision in performing a strictly governmental function. However, wages paid in performing a proprietary or private function are subject to tax unless specially exempted. In this connection, it should be observed that the provisions in the Social Security Act specifically exempting government employment do not distinguish between purely governmental functions and such as are private. It would seem to follow, therefore, as a natural consequence that both types of employment would consequently be exempt under these specific provisions. I wish to further refer you to a ruling of the Internal Revenue Bureau which, for convenience sake, I will set out in full hereafter:

" 70-S. S. T. 74

Bureau of Internal
Revenue Rulings
XVI-3-8493 S. S. T. 74
Section 907; Definitions.

Regulations 90, Article 206 (5)-(6): Government employees (Also Section 811; Regulations 91, Article 11).

"Services performed by the employees of the M. Company, which is wholly owned by a county and a city in the State of R and which operates ferries in that State, come within the exception provisions of section 907 (c)6 and 811(b)7 of the Social Security Act.

"Advice is requested whether the M Company and its employees are subject to the taxes imposed by Titles VIII and IX of the Social Security Act. The company is owned by the county of _____ and the city of _____, State of R. It operates ferries between certain cities in that State. The profits derived from operation of the ferries are divided between the county and the city.

"Title IX of the Social Security Act provides in section 901 for the levy of an excise tax upon employers (as defined in the Act) with respect to having individuals in their employ. The measure of the tax is the total amount of wages payable by an employer with respect to employment during the calendar year regardless of the time of payment. Section 907(c)6 of the Act provides in part as follows:

" '(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except— * * *

" '(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions.'

"Title VIII of the Social Security Act imposes an income tax upon employees and an excise tax upon employers, and section 811(b)7 thereof is identical with section 907(c)6 quoted above.

"Article 206(5)-(6) of Regulations 90 and article 11 of Regulations 91, relating to the taxing provisions of Titles IX and VIII of the Act, respectively, provide that the exception relative to services performed by State employees extends to every service performed by an individual in the employ of the several States, or any political subdivision or instrumentality thereof, including every unit or agency of government, without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature. Since the M Company is owned and operated as an instrumentality of the county of _____ and the city of _____, political subdivisions of the State of R, the excepting provisions of sections 907(c)6 and 811(b)7 of the Act extend to the services performed by the employees of that company. The organization and its employees are not, therefore, subject to the taxes imposed by the Social Security Act."

The premises considered, it is my opinion and I do so hold here, that wages paid to employees of Commissioners on the public road of the county are not subject to the tax imposed by the Federal Social Security Act, Title VIII, nor is compensation paid to County Commissioners for performance of their duties imposed by law upon them as County Commissioners, in the service of the County, subject to the taxes imposed by the Federal Social Security Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 6, 1937.

Hon. Haygood Paterson,
Sheriff, Montgomery County,
Montgomery, Alabama.

Uniform Firearms Act—

1. Act as amended provides for issuance of license only by Sheriff.
2. License may be revoked for cause which would have justified its refusal in the first instance.
3. Act as amended excepts licensed pawnbrokers from provisions regulating sales as set forth in Section 9.
4. Individual may loan, give or sell a pistol by meeting the provisions of the Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Please give me your opinion with reference to the following questions concerning Senate Bill 63 (Simpson), commonly known as the pistol law, effective date October 1, 1936:

"(1) Sec 7. Since the Probate Judge in regular practice remits licenses and fees to the State and is an office of record for such payments to the State, would it not simplify the operation of this section of the act for the Probate Judge of each county to issue all such licenses upon the approval of each application by the Chief of Police of the municipality in which the applicant lives or by the Sheriff of the County? In this way there will be a concentration of records and uniformity of payment of fees into the State treasury?

"(2) When a person has been issued a license to carry a pistol according to the provision of Section 7, will it be possible to revoke said license for any cause?

"(3) Sec. 12. If a person has pawned a pistol prior to the effective date of this act, can the pawnbroker deliver the pistol to the person pawning it or to any other person without being subject to the dealer's license? What restrictions are placed on a pawnbroker or any person accepting a pistol as a mortgage, deposit or pledge by the provisions of this act?

"(4) If an individual not a dealer wants to give, loan or sell a pistol, what is required of him by the provisions of this act?

"These questions have been asked me by many citizens, and since the act is now in operation will appreciate your opinion as soon as convenient."

I am of the opinion that your inquiries should be answered as follows:

1. Section 7 of the Uniform Firearms Act has been amended by an Act approved March 2, 1937 (Governor's No. 190, H. 161, Douglas) and now provides for the issuance of licenses only by a Sheriff.

2. The general rule is that a license may be revoked for any reason that would have justified a refusal to issue it in the first place. Where the Act enumerates the causes for which a license may be revoked, it is usually held that it cannot be revoked for a cause not enumerated. As no causes are mentioned in the Uniform Firearms Act, for which license may be revoked, the general rule will apply and the license may be revoked for any reason that would have justified a refusal to issue it in the first instance, 37 C. J., Section 110 at page 247.

3. Section 12 of the Uniform Firearms Act must be construed in connection with Section 9 of said Act as amended March 2, 1937. This section as amended provides in part:

"This Section shall not apply to sales at wholesale, nor to the pawning or pledging of a pistol by the owner thereof to a pawnbroker licensed by the state and by the municipality in which he does business."

4. A pistol may be loaned to a person who has a permit to carry same, but the Uniform Firearms Act makes no provision for the selling of a pistol by an individual.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 26, 1937.

Dr. J. A. Keller,
Superintendent of Education,
State of Alabama,
Montgomery, Alabama.

Boards of Education may make lease for bus bodies and chassis extending over a period beyond the current year, provided Board of Education is not legally bound to continue payments beyond current year.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 4, 1937, in which you request my opinion as follows:

"Many boards of education are desirous of improving their transportation facilities immediately. Many dangerous, homemade wooden school bus bodies are being used in the transportation of school children.

"County boards of education are given an annual allotment from the Minimum Program Fund for the purpose of providing for school transportation. These funds are not sufficient in any one year for a school board to purchase new busses and chassis outright. However, if an arrangement could be made whereby these boards could obtain bus bodies on a lease rental contract for a period of from three to four years, the ownership of the busses to pass into the hands of the board of education at the end of this period, better equipment would be made available at once. I am, therefore, requesting your opinion concerning the following:

"1. Is it legal for boards of education to acquire bus bodies and chassis by means of a lease rental contract extending over a period of from three to four years, the ownership of these busses to be transferred to the board of education at the expiration of the lease rental period?

"Permit me to call your attention to the following act which has a bearing upon this point:

"Section 5 of Act No. 300, approved September 2, 1935, provides that budgeted expenditures in any year may not exceed budgeted income plus balances on hand for that year. It would seem that the plan referred to above would not violate this provision, provided that the lease rental contract in any year, taken together with other expenditures of the school system, does not exceed the anticipated income for that year.

"Section 9 of Act No. 300 provides that current loans made by boards of education must be repaid within the fiscal year in which made. If a lease rental contract of the nature described above is interpreted as a current loan, evidently my question must be answered in the negative. However, it is possible for boards of education to acquire school busses on a lease rental contract and operate such busses over a period of four years on practically the same money as would be necessary to pay contractors to transport the school children in privately owned busses. Under a lease rental contract the board of education would not obligate itself in the same manner as it would if it pledged future revenues on current loans which would make such revenues unavailable for the operation of schools in future years.

"2. Is it legal for boards of education to rent or lease school busses and chassis for a period of from three to four years with the option of purchasing such busses for a nominal sum at the end of such lease or rental period? Act No. 300 referred to above has a direct bearing upon this question also.

"May I urge that these questions be answered at the earliest possible moment for the reason that several boards of education are awaiting answers to them before acting upon this matter."

Your first inquiry is whether it is legal for boards of education to acquire bus bodies or chassis extending over a period of from three to four

years, the ownership of these busses to be transferred to the board of education at the expiration of the lease rental period. The proper answer to this question depends somewhat upon the type of instrument and the exact terms of the instrument contemplated by you. Act No. 300 of the Acts of 1935, page 728, requires the establishment of a budget system for each county and city school system of the State. Section 5 requires that the budgeted expenditures not exceed budgeted income. Section 7 limits the actual expenditures to the budgeted expenditures except under certain prescribed conditions of emergency. Section 8 requires that actual expenditures not exceed actual income plus balances on hand. Section 9 gives the county board of education authority to borrow money on the credit of the school fund to meet the salaries of teachers and other current expenses when the current funds on hand are not sufficient to meet the same, and as security therefor, to pledge the current revenues of the current fiscal year. It is expressly provided that "all such current loans shall be due and payable not later than the end of that fiscal year. * * * At no time shall loans be secured or certificates be issued for current expenses for any year which shall pledge school revenues of any other fiscal year. The amount which is borrowed either by loan or certificate of indebtedness shall at no time exceed one-third of the sum paid for all current expenses including teachers' salaries during the preceding school year. Boards of education shall have authority to pay interest at the rate of not exceeding 6 per cent per annum on such loans or such certificates of indebtedness as may be issued."

The ordinary lease sale contract, in my opinion, would not constitute a loan as referred to in Section 9 of the Act. See **Commercial Credit Company v. Tarwater**, 215 Ala. 123, 110 So. 39. If the lease contract is so drawn that the county board of education is obligated to pay the full amount of the contract over a period of four years, it may violate the other provisions of Act No. 300 above set out. On the other hand, if the lease contract is so drawn that at any time the board of education fails to meet the payments of rental, all rights and liabilities under the contract cease, in my opinion, such a contract would be legal and would not violate any of the provisions of the Act above referred to. In this connection, I refer you to the opinion to Hon. W. M. Vaughan set out in Vol. V, Quarterly Report of Attorney General, page 26, in which an analogous arrangement for the purchase of a jail was approved by this office.

I believe the answer to question 1 above referred to also answers your second question. If the contract of lease binds the county board of education to pay an amount three or four years in the future, in my opinion, it would be prohibited by the Act above referred to. On the other hand, the inclusion of an option to purchase at the end of four years would not make illegal a lease contract under which the county board of education is not obligated beyond the current year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1937.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Elba, Alabama.

Expense of conveying crippled children to hospital not a proper claim against the County but may be paid by Department of Education under Act of 1935, p. 807.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 14th, in which you request my opinion as follows:

"A claim is presented to the Court of County Commissioners for transportation charges for conveying back and fourth crippled children to hospital in Mobile, Alabama. As I do not find any law, which expressly authorizes the County to pay such expenses, I am hereby requesting your opinion, and will thank you for your promptness in this matter. Mrs. Mamie B. Hill, Public Welfare Director, has filed such claim for payment by our Commissioners Court."

I know of no law giving a Court of County Commissioners authority to pay the charges referred to in your letter. However, I call your attention to the Act of 1935, No. 398 (General Acts of 1935, p. 870), under which certain appropriations for the purpose of providing medical, surgical and other services, care and treatment of crippled children were made available and were required to be administered by the State Board of Education.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 28, 1937.

Hon. F. G. Hereford,
Sheriff, Madison County,
Huntsville, Alabama.

Sheriffs—Expenses of returning prisoners charged with felonies a proper charge against the State and not the county, although such prisoners are convicted of a misdemeanor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 21, 1937, in which you request my opinion as follows:

"The State examiners have charged me back with several cases in which I made trips to various cities and States for prisoners, charged with a felony.

"This expense has already been collected by me from the County. All of these cases as charged back by the examiner are supposed to have been paid by the State, which is correct so far as felony cases are concerned.

"The question that I wish settled is this. Most of these cases were tried and convicted of misdemeanors, several were nol prossed, one case was entered on the docket by the Court 'Improperly on the docket.' Another case where we went to Belton, Texas, for two prisoners and returned, at a cost of One Hundred Thirty Four and 15/100 Dollars. In this case, one of the defendants, Hargrove, was convicted and sentenced to the penitentiary for several years, and Busby, who was with him on a similar charge. In this case it was marked 'Improperly on the docket.' But this same party, Busby, was convicted of petit larceny, and sentenced to hard labor.

"Should the County pay one-half of this cost or should the State pay all of it?

"It looks as if the County should have to pay for all cases that were convicted on misdemeanors, and the other cases that were dismissed by the Court.

"The whole trouble with me, is if I should have to pay the County in all of these cases, or refund the money collected from the County and collect same from the State, and in the event the State failed to pay me, then who am I to look to for the expense of bringing these parties to trial?"

It seems, from your letter, that in each of the cases, the prisoner was charged with a felony. One of them was convicted of a felony, several were convicted of misdemeanor, while others were nol prossed. Your inquiry is whether under these circumstances any of the expenses of returning said prisoners is a proper charge against the county rather than against the State. In my opinion, all of said expenses are proper charges against the State and none of them is a proper charge against the county. Such expenses are governed by the provisions of Code Section 3749 and Code Section 3741. Section 3749 provides:

"3749. Expense of bringing back absconding felon on requisition; how paid. — Any sheriff or other person commissioned as agent of this state to receive from another state any prisoner for removal to this state to answer a charge of felony, is entitled to receive actual expenses and two dollars per day while going to and returning from the place where the prisoner is arrested or confined, to be paid, on the approval of the governor, as in other cases of removal of prisoners by sheriffs.

You will note that this section makes no reference to conviction of the prisoners or the disposal of the case, but is based entirely upon whether the prisoner is charged with a felony. This section refers to Section 3741 for the manner in which the expenses are to be paid "as in other cases of removal of prisoners by sheriffs." The applicable portion of Section 3741

with respect to the fees of the sheriff for removing prisoners is "together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, to be paid by the State in case of felonies, and by the county when the offense committed is a misdemeanor, upon his sworn statement and account therefor, accompanied by a certificate of the clerk of the court in which the prisoner is or will be, triable, that such fees have been reported to and docketed, or will be docketed by him." The section further makes provision for charging said costs to the prisoner if the prisoner is convicted.

The underlined portions of said section, together with the provision as to what shall happen if the prisoner is convicted, are incompatible with any holding other than that the right of the sheriff to the expense from the State or from the county is determined by the crime with which the prisoner is charged and not by the offense of which the prisoner is ultimately convicted. The provision as to certificate of the clerk recognizes that such account may be made out before trial and before the cause has been completely docketed by the clerk. In my opinion, therefore, these expenses are payable by the State where the prisoner is charged with a felony, although the prisoner may later be convicted of a misdemeanor or the charge may be nolle prossed. Compare the opinions in Quarterly Report of the Attorney General, Volume 6, page 17, Quarterly Report of the Attorney General, Volume 2, page 118, Question 29, and Biennial Report, 1932-34, page 381, holding that the amount of the sheriff's fee for making arrest is determined when the fee attaches, and if the prisoner is charged with the felony, the sheriff is entitled to the fee provided for arrests of felons, although the prisoner is later convicted of a misdemeanor.

It has also been held by this office that the county commissioners court is without authority to pay the sheriff for actual expenses for removal of prisoners charged with a felony to the county. Biennial Report, 1932-34, page 175; Biennial Report, 1932-34, page 12. In my opinion, therefore, all the expenses referred to in your letter are proper charges against the State and none of them is a proper charge against the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 10, 1937.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County, Bessemer Division,
Bessemer, Alabama.

Taxation—Homestead exemptions — Act No. 107, p. 113 Special Session, 1936-1937.

Property used as a homestead before and since sale to the State in 1934 for taxes, which was redeemed from State after October 1,

1936, on annual installment payment plan, is exempt from lien for State taxes.

Opinion by Assistant Attorney General Simmons:

Dear Sir:

Reference is made to your inquiry as follows:

"To be more explicit in my request; a man owns a piece of property which he bought in 1932. In 1933 he did not pay his taxes and in 1934 sold to the State for its taxes for year of 1933. In November, 1936, this man redeems his property and comes in and claims Homestead Exemption, which he has lived in and had possession of since 1932. Is he entitled to Homestead Exemption?"

You orally supplemented the foregoing facts by stating that the property was redeemed pursuant to the annual installment payment plan set forth in Section 291, Act No. 194, General Acts of Alabama, 1935, p. 256.

It is my opinion that the property is exempt from State taxes within the limits of and pursuant to the terms of Act No. 107, Special Session, 1936-1937, which provides exemptions of homesteads in Alabama from State taxes.

When the first installment was paid, redemption was perfected, and title passed out of the State into the redemptioner, subject to the lien of the State for unpaid installments and current as well as future taxes.—Section 292, Revenue Act of Alabama (Act No. 194), General Acts, 1935, p. 256. See opinion of this office to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of June 26, 1937. Also see opinion of this office to Hon. Roy Johnson, Vol. 2, p. 207, from which the foregoing is quoted:

"Without more, the foregoing would very clearly indicate that so far as passing the title from the State to the redemptioner, the same legal effect is intended by the installment payment as if the redemption money had been paid in full."

The redemptioner is required within thirty days from the date of making the initial installment payment, to assess the property for taxes for the then current tax year.—Section 291, General Revenue Act, *supra*.

When the redemptioner paid the initial installment, the State immediately acquired a lien for taxes for the then current tax year, and that is true whether the lien for taxes which attached as of October 1st against all other property, or a different lien created under Section 292, General Revenue Act, *supra*, attached. A lien attached for current taxes, and as against the same for State taxes, the property is exempt.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 10, 1937.

Hon. Solomon Baxter, Superintendent,
Houston County Board of Education,
Dothan, Alabama.

County Board of Education may consolidate entire county outside of district of incorporated city into one school tax district.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 16, 1937, in which you request my opinion as follows:

"I am writing you with reference to the Houston County Board of Education local tax units.

"Houston County is divided into thirteen different tax districts including the City of Dothan. The Board wishes to enlarge its districts. The consolidation of schools no longer makes it necessary to maintain small tax districts. Will the Board be within its right to include the whole county outside of the district of Dothan in one tax district? or will the County Board of Education need to fix two school districts in Houston County outside the City of Dothan? If you have ruled on this point please refer me to such; if not, please give this your attention as early as convenient."

In answer to your inquiry I refer you to the opinion of this office in Biennial Report 1924-1926, p. 311. I quote from that opinion:

"Therefore, we arrive at the conclusion that the method of consolidation provided in Sections 235 and 236 of the School Code apply only when a part of the territory sought to be consolidated is levying the special tax; that when none of the territory sought to be consolidated is levying such tax, then the county board of education can district such territory over which they may have jurisdiction or which may not have been by law districted.

"However, this discretion must be exercised with due regard for the needs of the county and cannot be exercised **arbitrarily**.

"To the County Board of Education is committed the power of determining the boundaries of school districts lying without the incorporate limits of cities of two thousand or more population. In the exercise of the discretion of the county board of education in fixing the boundaries of such district, the courts will not interfere unless it appears that the fixing of the boundaries of such district was arbitrary and violative of all things conducive of serving the best educational interest of the people of the district. With the advent of good roads and improved transportation facilities it is reasonable to suppose that the area that should be included in a school district so as to serve best the educational interests of such territory will constantly become larger. Determining of such is committed to the county board of education and

its action is final so long as that action is determined by the consideration of the best educational interests of the territory to be served.'

"Therefore, in the instant case, I am unable to advise you whether or not such a districting of your county would be an arbitrary exercise of this discretion. If such should be shown to have been arbitrarily done and not for the best interests of the county or the people, the courts would interfere.

"Hoping that the foregoing discussion will clarify the question, I am."

Sections 235 and 236 of the School Code of 1924 referred to in that opinion have been brought forward into the School Code of 1927 as Sections 275 and 277 without change.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 10, 1937.

Hon. T. D. Woodham,
Tax Assessor, Dale County,
Ozark, Alabama.

Homestead Exemption — Act No. 107, Special Session 1936-37,
Legislature of Alabama.

(a) One of the two joint owners of farms occupied as homestead may claim fractional homestead exemption.

(b) Owner of farm who lives approximately five miles therefrom on five-acre tract is entitled to homestead exemption out of farm provided he cultivates both tracts in connection with each other and in common for the support of his family.

(c) Owner who cultivates farm, but resides in rented house located off of farm, is entitled to homestead exemption out of farm provided he cultivates both tracts in common and in connection with each other for the support of his family.

(d) Widow living on homestead of deceased husband who died intestate is entitled to claim homestead exemption out of property which she occupies.

(e) Joint tenant with others of unpartitioned real estate who occupies a portion thereof, is entitled to homestead exemption out of the joint property, but his fractional ownership of the homestead does not enlarge the area of its operation so as to make up in quantity what is wanting in extent of ownership.

(f) Husband who owns and occupies property as homestead which is assessed in the name of the wife may claim the homestead as exempt.

(g) A person who entered into a contract of purchase since October 1, 1936, and immediately went into possession may not claim homestead exemption for the tax year 1936-37, but may lawfully claim exemption for succeeding tax years.

(h) Wife may claim homestead exemption out of her property upon which she and her husband live, although husband owns contiguous tract.

(i) Husband may claim homestead exemption out of his property which he and his wife occupy, although wife owns contiguous tract.

(j) Husband and wife may claim homestead exemption out of property which he and his wife jointly own and occupy as a homestead, but not more than one homestead.

(k) A single person is entitled to claim an exemption as to homestead.

(l) Tax Assessor is not responsible for any losses accruing to the State of Alabama by reason of a false claim of homestead exemption, it not being his duty to ascertain the truth and correctness of such claim under oath.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date, which I quote as follows:

"In complying with section number 31 of the 1935 Revenue Bill as amended by Special Act approved March 12, 1936, regarding homesteads, the following questions have arisen and I desire your official opinion on same.

"(a) John and Jack own 280 acre farm jointly. Should more than one homestead be allowed to them?

"(b) Owner personally cultivates a farm but lives approximately five miles therefrom on five acre tract conveniently located to the road. Is the owner entitled to a homestead out of the farm as well as the five acre tract.

"(c) Owner cultivates farm, but does not live thereon because there is no house. He rents a house located off the land. Can homestead lawfully be claimed out of the farm?

"(d) Widow lives on homestead of deceased husband. Is she entitled to claim a homestead on property which she occupies? Would the same thing be true as to husband who lives on real property owned by his deceased wife and which both of them occupied before her death?

"(e) What homestead would heirs to property be entitled provided each occupies and cultivates a portion of the property which he owns jointly with the other heirs? Please answer as to one heir and as to more than one heir so occupying the property?

"(f) Owner of homestead assesses property in name of wife. Which one may lawfully claim the homestead?

"(g) A entered into a contract of purchase with the Federal Land Bank of New Orleans since October 1, 1936, and immediately went into possession and began occupying the property as a homestead. The property was assessed in the name of the Federal Land Bank. Is such party entitled to claim a homestead in the property included in the contract of purchase?

"(h) Husband and wife each own 80 acres of land. The tracts are contiguous. If they live on the wife's property, out of what portion of the property should the homestead be carved? Please answer the same question if they live on the property of the husband.

"(i) Man and wife own joint title to property which they occupy as a homestead. What would be the homestead? Which one is entitled to claim the homestead?

"(j) Is a single person entitled to claim a homestead?

"(k) A taxpayer claims a homestead and makes a false affidavit in order to get it set out on his assessment. Can a Tax Assessor be held liable for any losses sustained by the State caused by granting a homestead under such circumstances?"

It is my opinion that two joint owners of a farm who occupy the same as a homestead may claim homestead exemption but only one such exemption. Each owner has a fractional interest in the farm, and, therefore, has a fractional interest in the homestead.

The exemption of a homestead was provided by the legislature in its Special Session, 1936-37, Act No. 107, as follows:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and laws of the State of Alabama."

"Section 2. Homesteads as herein defined are hereby exempt from all state ad valorem taxes beginning October 1, 1937."

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000) in assessed value, nor more than One Hundred Sixty (160) acres in area." (Approved February 20, 1937.)

Each of the two joint tenants who occupy the land would be entitled to an exemption not exceeding One Thousand Dollars each in assessed value provided the homestead does not exceed in area One Hundred Sixty (160)

acres nor in assessed value the sum of Two Thousand Dollars. If the assessed value of the homestead is Two Thousand Dollars or less, then each of the two joint owners would be entitled to an exemption of one-half of the assessed value. I defer further discussion of such exemption at this time for the reason that your letter again presents the same subject which I later discuss in this opinion with citation of authorities. See opinion to Hon. O. S. Nichols, Marion, Alabama dated July 8, 1937.

(b) It is my opinion that the owner of the farm who lives approximately five miles therefrom on a five-acre tract is entitled to homestead exemption out of the farm, provided he cultivates said lands in connection with each other and in common for the support of his family. It was said in the case of **Dicus v. Hall, Hooper and Co.**, 83 Ala. 159, 3 So. 239, that "Where the debtor resides on a tract of land containing sixty acres, and purchases another tract containing 80 acres, from which he obtains timber and firewood for the homeplace, cultivating the two places together, and obtaining his supplies from both, the two tracts together being of less value than \$2,000; the purchased tract may be claimed as a part of his homestead exemption, although separated from the homeplace by an intervening tract six hundred yards wide." See also **Shubert v. Winston**, 11 So. 200, 95 Ala. 514, in which it was held that "Land which is cultivated in connection with other land, upon which the owner resides, and which with the other, is a source of family support, constitutes a part of the homestead, although it be not contiguous thereto." You should determine whether or not the owner of the property cultivates both tracts in connection with each other and in common for family support, as the existence of such facts determines the status of the property as a homestead. The cultivation of the lands in the manner indicated in the opinion from which I have quoted is tantamount to actual occupation thereof as required by law.

(c) It is my opinion, in answer to question (c), in which you state that the owner of the farm lives in a rented house off the premises and you ask if this farm is exempt as his homestead, should be answered in the affirmative, provided the claimant of the owned and rented premises cultivate both tracts in connection with each other and in common for the support of his family. **Dicus v. Hall, Hooper and Company**, supra. **Shubert v. Winston**, supra. The Supreme Court of Alabama in the case of **Bailey v. Dunlap Merchantile Company**, 138 Ala. 415, pertinent to the question (c) had the following to say:

"The writ of attachment was sued out on the 5th day of December, 1901, and levied upon the lands in controversy two days later. At and prior to the day of the levy, the defendant, with his family, was residing upon a forty acre tract of land which he had rented from one Costello for the years 1901 and 1902. He had previous to the levy of the attachment purchased the two pieces of land levied upon, both of which were contiguous to and adjoined the leased premises upon which he resided. One of the parcels, comprising forty-five acres, he acquired from one Remley; the other, comprising thirty-five acres, he acquired from Costello—making the entire tract, including the rented lands, one hundred and twenty acres.

"It is of no consequence what the character of his estate in any portion of the one hundred and twenty acre tract was or may have been at the date of the levy. So he had an estate in that portion of the tract upon which he resided, whether a fee or less, is all that is required, provided it was the dwelling place of his family and was

used and occupied as such.—Section 2033 of the Code. “There is no limitation to any particular estate, either as to duration, quality or extent. It is the land upon which the dwelling place of the family is located, used and occupied as a home, which the constitution and statute protects, however inferior may be the title, or limited the estate or interest.”—*Tyler v. Jewell*, 82 Ala. 93 *Griffin v. Chattanooga Sou. R. R. Co.*, 127 Ala. 570. Nor can it be of consequence that defendant acquired the tract in parcels at different times or that his estate in each parcel may be different in degrees.—*Waples on Homestead and Exemptions*, par 9, 115. He is, as against the plaintiffs, the owner of the tract in its entirety and if, as here, the entire tract, does not exceed one hundred and sixty acres and two thousand dollars in value, the whole of it is his homestead and exempt from the payment of his debts. Nor is it of importance that tenants may have occupied, at the date of the levy of the attachment, a portion of the parcels acquired from Remley and Costello. The owner of a homestead may, if he chooses, rent out a portion of the tract without subjecting the portion so rented to the payment of his debts.”

Referring to your question (d) it is my opinion that a widow who lives on a homestead of a deceased husband who died intestate is entitled to claim homestead exemption out of the property she occupies. The widow, until her dower is set aside, is entitled to quarantine rights authorized by Section 7437, Code of Alabama, 1923. The use of the property by the widow pending dower as authorized by the foregoing Code Section is such a beneficial interest in the property as in my judgment entitles the widow to claim exemption from taxes on a homestead. She is entitled to homestead exemption which should be set aside to her in the manner provided by law, and in my judgment, so far as exemption from taxes on the homestead is concerned, the use of the property to which the widow is entitled is nothing more than due recognition of such homestead rights although there is no definite determination thereof by metes and bounds.

I am not answering the second question contained in paragraph (d) of your letter for the reason that the facts stated in that question are insufficient. In order for me to reach a correct conclusion, it will be necessary for you to tell me whether or not the widow left other lands which are not connected with the premises occupied by the husband.

Answering question (e) of your request, it is my opinion that an heir to unpartitioned real estate who occupies and cultivates a portion of the property which he jointly owns with other heirs is entitled to homestead exemption out of said property, but his fractional ownership of the homestead “does not enlarge the area of its operation, so as to make up in quantity, what is wanting in extent of ownership.”

Justice Stone in speaking for the Court in the case of *Snedecor v. Freeman*, 71 Ala. 140, after making due reference to *McGuire v. Van Pelt*, 55 Ala. 344, said as follows:

“We settled in those cases that the fractional ownership of the claimant of homestead did not enlarge the area of its operation, so as to make up in quantity, what is wanting in extent of ownership. We ruled that the homestead claim is limited to the quantity the statute or constitution prescribes; and that the claim is valid only for such interest, both in extent and duration of ownership, as the claimant owns.

If the ownership be fractional, or less than a fee, then the exemption is fractional, and continuous only so long as the title of the owner and occupant lasts. The homesteads in these cases being governed by the constitution of 1868, and in quantity not to exceed eighty acres, it follows that whatever homestead interest the plaintiffs could claim in these cases, must be confined to the extent of ownership each of them had in a separate eighty acres. The testimony shows they were each of them entitled to an undivided one-eighth interest in the tract; therefore, the homestead can not exceed an undivided eighth interest in eighty acres, so selected as to include the actual homestead of the claimant. In overlooking the principle declared above, the Circuit Court was betrayed into some important errors. The whole tract of land contained four hundred acres, and it is not shown it was ever partitioned. The claims of these plaintiffs are each limited to eighty acres—one hundred and sixty acres for the two. Whatever interest they had in the remaining two hundred and forty acres, they could not claim as homestead."

I am assuming from your inquiry that the land which is owned jointly by the heirs has never been partitioned in accordance with law, or by agreement, and further, I assume that the occupancy is joint. If such are the facts, then only the heirs occupying the property are entitled to any homestead exemption. As an example, if there are five heirs to the property, four of whom live thereon, and the other one does not, but resides some distance away and does not cultivate the land or any portion thereof, then only the four heirs would be entitled to the homestead exemptions and their ownership in the property would not enlarge the area of the homestead operations. Only one homestead exemption, conforming to lawful area and assessed value, could be granted in the unpartitioned property. Each of the four heirs residing on the property would be entitled to an exemption of one-fifth of the lawful exemption, but not exceeding in one-fifth of two thousand dollars. The heir who does not reside on the land, and cultivates no portion thereof, would not be entitled to any exemption. In the example I have just given, the four heirs would be entitled to an exemption of Sixteen Hundred Dollars, that is, provided the assessed value amounts to Two Thousand Dollars. This rule has application to an unlimited number of joint tenants. As a further example, if the land occupied by two joint tenants, which has never been partitioned is assessed at Two Thousand Dollars, each of the joint tenants would be entitled to an exemption of One Thousand Dollars as to payment of taxes. See opinion of this office to Hon. O. S. Nichols, Marion, Alabama, dated July 8, 1937.

Referring to the facts presented in question (f), it is my opinion that a husband who owns and occupies property as a homestead, which is assessed in the name of the wife, may claim the homestead as exempt. It was the intention of the legislature to exempt the homestead and not to deny that right just because the property happens to be wrongfully assessed, or assessed in the name of the wrong party.

According to the facts presented in question (g) of your inquiry, it is my opinion that such person who entered into a contract of purchase with the Federal Land Bank of New Orleans after October 1, 1936, going into possession of the property, could not be lawfully entitled to an exemption of such homestead from the payment of taxes assessed on October 1, 1936, but only for succeeding tax years. The property did not have an exempt status at the time a State lien for taxes attached, that is, it was not a homestead at that time, and therefore is not entitled to exemption. It must be a bona fide homestead at the time the tax lien attaches.

In answer to question (h) of your letter, it is my opinion that the husband may claim a homestead exemption out of his property which he and his wife occupy, although his wife owns a contiguous tract. This contiguous tract of the wife would not be a part of the homestead. Also, the husband and wife occupy land belonging to the latter, the wife would lawfully be entitled to claim such occupied land as a homestead, but she could not include the contiguous tract belonging to her husband. **Beard v. Johnson**, 87 Ala. 729, p. 732, I quote as follows:

"In the case before us, the homestead, or family residence, was on the lands of the wife. The husband owned adjoining lands, cultivated a portion of them in connection with his wife's tract, and put the residue to rent, by annual lettings. The two tracts combined were twenty acres in excess of the greatest quantity allowed as an exempt homestead—one hundred and sixty acres. The wife's land was the homestead, and if claimed, was clearly exempt from any debt due by her. She owned it, and, together with the family, occupied it. We think it is manifestly against both the letter and the spirit of the law, that the two holdings, being not in common, but by different persons, should be tacked, the one to the other, and thus become an individual homestead, claimable by either. She, owning, and, together with the family, occupying the homestead proper—the land on which they resided—was, without doubt, entitled to claim the exemption from debts. This disabled him, so long as that ownership and occupancy lasted, to assert homestead in other land, on which the family did not reside."

Answering question (i), it is my opinion that the husband and wife are entitled to a homestead, but not to exceed \$1,000.00 in assessed value for each. The answer herein to question (a) hereof is applicable; also the reasons set forth in answer to question (e) have application.

It is my opinion that the exemption is applicable to a homestead of a single person. Section 3 of the Act exempting the homesteads says that the exemption shall apply only to one person, head of a family. The words "head of a family" are in my judgment, intended to be construed along with the restriction of the exemption to one person, both statements having the effect to restrict one exemption to a family. It was not the intention of the Legislature to permit more than one member of a family to claim an exemption, nor was it the intention of the Legislature to deny a single person, although not connected with a family, the right to claim a homestead.

It is further my opinion that the tax assessor is not responsible for any losses accruing to the State of Alabama by reason of a false claim for a homestead exemption. The Legislature imposed upon the tax assessor the duty of listing and valuing the homestead separately from other property. See Act approved March 12, 1936, (Acts Ala. Ex. Sess. 1936, p. 4). The tax assessor is required to administer the oath to the person making the return of the property for taxation and also claiming the homestead exemptions. Revenue Laws of Alabama, 1935, Section 32. Section 33 of the same Revenue Act imposes upon the tax assessor, the duty of making inquiry of a taxpayer as to the items of property subject to taxation owned by him. I cannot find from examination of the law which imposes duties upon the tax assessor, or from recent enactment with reference to homestead exemptions, that the legislature at any time has imposed upon the tax assessor the duty of ascertaining the truth and correctness of the taxpayer's claim for a homestead exemption. If the verified claim which the taxpayer is required to

make is false and a loss accrues to the State of Alabama by reason thereof, the tax assessor is not responsible therefor, but upon ascertainment of such false claim, within five years, he must assess the property as an escape.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 11, 1937.

Hon. J. A. Keller,
Superintendent of Education,
State of Alabama,
Montgomery, Alabama.

County Board of Education may compromise with contractor for damages due to delay in commencing building operations on school.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"It appears that the J. D. McEaddy Building Construction Company entered into a contract on November 6, 1935, to build two buildings for the Marshall County Board of Education. The contract bid on these buildings was \$11,460 for the one at Mt. Hebron and \$1,337 for the addition at Douglas. There was some delay in getting the project started, due to certain Public Works Administration regulations. In the meantime, the cost of building materials had advanced and the McEaddy Building Construction Company protested to the county board of education. The county superintendent agreed that in the event the construction company lost money on the contract he would recommend that the county board of education assume at least half the loss, provided he could be assured of the legality of such a payment in addition to the contract prices set out above. The building company, meanwhile, has completed its contract and received full payment. It is requesting the county board of education to pay it \$350 in addition to the contract price.

"Attached hereto are papers which will show you the complete history of the case. I shall thank you to return these papers for our files when you deliver your opinion on the following questions:

"1. Should the Marshall County Board of Education pay the claim of the J. A. McEaddy Building Construction Company?

"2. Should the County Board now authorize such payment, would it be a legal expenditure?

"3. Would such a payment become a charge against the County Superintendent and his bondsmen?"

To give you a proper answer to this question I have found it necessary to secure the original contract and other papers, since a proper decision depends entirely on the facts and there are many facts which are not fully set out in your letter. From these original papers it seems that the J. D. McEaddy Building Company submitted a bid to construct two school buildings, which bid was dated November 6, 1935, and provided:

"It is hereby agreed that the award of the contract shall be conditioned upon funds being made available from the Federal Emergency Administration of Public Works, and upon the applicant having the right to hold the bids for a period of thirty days from the date of opening thereof."

Within the thirty days formal contract was executed, dated December 5, 1935, which contract, however, provided:

"This contract shall not be effective until it has been approved by the State Director of the Public Works Administration of the State of Alabama."

Such approval by the State Director of the Public Works Administration was eventually granted on April 1, 1936. It also appears that the contractor had executed a subcontract for its lumber, but on account of advance in prices of lumber the subcontractor withdrew his offer in writing on February 5, 1936, prior to the approval of the contract by the PWA. As a result thereof, at the time of the approval the McEaddy Construction Company was required to pay a higher price for lumber to go into the building.

Under these circumstances, before the contractor would commence work, he submitted a claim for the additional amount of \$673.51, representing the difference in the price of lumber contained in his original subcontract and the price obtainable in April, 1936. Had a definite and binding agreement been made at that time to induce the contractor to continue performance of his contract, in my opinion the Board would be bound by such agreement. However, further letters indicate that pending advices from the Public Works Administration, the County Board of Education notified the contractor:

"Please let us know if you are willing to proceed with work on these buildings and leave the decision on your claim to future developments. If you feel that you cannot proceed with work on this basis, let us know if you prefer release from the contract."

On May 19 the contractor addressed a letter purporting to confirm a conversation and agreement with the County School Superintendent, to members of the School Board and the architect, in which it is stated:

"It is understood that in consideration of the writer starting work on the Marshall County school jobs without further delay, subject only to approval of change order No. 1 by Mr. Geismer representing the PWA, you as architect, and the County School Board of Marshall County as owner, agree to give the undersigned the privilege of using as the original lumber specifications all the specifications set out in Change Order No. 1 on the lumber for those jobs. It is also understood that toilets of the

Mt. Hebron School are to be entirely omitted from the contract. It is further understood that there is to be no change in the original contract price on these jobs on account of the items set out above. It is also understood that the changes noted above are final and binding on both parties and the writer agrees to make no further claim on account of advances in materials or labor and that the School Board agrees to make no claim on account of any advantages the writer may obtain in the purchase of his materials or the closing of subcontracts on this work. In other words, it is understood that the whole matter is in the nature of a compromise agreement and is agreeable to both writer and the Marshall County School Board."

Whether there was any new binding agreement to this effect seems to be doubtful for in Mr. Clay's letter it is stated that it was understood that the construction of the toilets on the Mt. Hebron job was conditioned on the omission being approved by the PWA and that this change order was rejected by the Director of the PWA.

As I construe your first question, it is whether the Marshall County Board of Education is under a legal liability to pay the J. E. McEaddy Construction Company the sum of \$350.00. This Question is entirely one of fact and from the facts given to me I am not able to say that the Marshall County Board of Education is under such legal obligation. It is the general law that a promise to pay a building contractor additional compensation for performance of a contract which he is already under obligation to perform is invalid because without consideration. *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, 28 L. R. A. (N. S.) 450.

Courts of many states recognize an exception to this rule in the case of unanticipated difficulties. *United States v. Cook*, 257 U. S. 523, 66 L. Ed. 350, 42 Sup. Ct. Rep. 200; Annotation, 25 A. L. R. 1459.

If the promise of additional compensation is not a mere promise to pay an additional sum for performance of that which the contractor was already bound to perform, but is a compromise of a disputed claim, it is uniformly held that there is sufficient consideration for the promise of additional compensation. 25 A. L. R. 1468, and numerous cases there cited.

It is also well settled that if the owner of the premises delays a contractor in the performance of his contract, the contractor is entitled to the damages naturally arising from such delay and the election of the contractor to continue performance in spite of the delay does not deprive him of the right to damages therefor. 2 Williston on Contracts, Section 704, page 1358; *Louisville, etc. R. R. Co. v. Hollerback*, 105 Ind. 137, 5 N. E. 28 *Weeks v. Rector*, 26 N. Y. App. Div. 195, 67 N. Y. Supp. 370.

Applying these principles of law to the facts which I have been able to gather from your letter and from the documents furnished, in the event the delay in starting work has been caused by the fault of the Marshall County Board of Education in my opinion the contractor would have a valid claim against the county. Since, however, the contract was conditioned on its approval by the Public Works Administration and such delay was entirely in obtaining such approval and without the fault of the Marshall County Board of Education, the contractor is not entitled to a claim on this ground.

If a valid and binding agreement was made by or on behalf of the County Board of Education to pay the sum of \$350.00 to induce the contractor to proceed with a contract from which the County Board of Education recognized he might have been released by reason of the delay, in my opinion the contractor would have a valid legal claim for such amount. As to whether there was such an agreement, there seems to be a dispute of fact, McEaddy apparently claims such a binding agreement to omit the toilets, the price of which was \$350.00, while the Superintendent of Education states that such agreement was subject entirely to the approval of the PWA. Under such circumstances, I am not able to say that the contractor has a binding and valid claim. It is my suggestion that if the contractor wishes to enforce such claim and feels that he has further facts entitling him to recover, that the matter should be submitted to the proper tribunal for the decision of such disputed facts.

Your next question is whether, if the County Board should authorize such payment, it would be a legal expenditure. In my opinion, this question should be answered in the affirmative. Such payment would be in the nature of a compromise of a disputed claim for a larger amount. The County Board of Education has the power to contract and to sue and be sued and in my opinion they have authority to compromise a disputed claim and such compromise would be a lawful expenditure.

Your third question is whether such payment would become a charge against the County Superintendent and the sureties on his bond. This question is necessarily answered in the negative. If the expenditure is a legal expenditure in compromise, it would not become a claim against the County Superintendent. It seems that the Superintendent is somewhat worried for fear any payment would be on account of an agreement made by him with the contractor. If such agreement was made and was in excess of the authority of the County Superintendent of Education, it would not be binding upon the County Board and any payment made by the County Board would therefore not be the result of an unauthorized act of the County Superintendent of Education and would not become a charge against him.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 11, 1937.

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama.

Revolving Fund—

Not exceeding twenty per cent of Revolving Fund may be used in employing school architects and draftsmen, employing temperance workers, and furnishing school registers and other printed materials, under conditions set fourth in request

Opinion by Assistant Attorney General Knabe

Dear Sir:

I have your letter in which you make the following inquiries:

"1. Can the State Board of Education use a portion of the twenty per cent of the Revolving Fund for the purpose of employing school architects and draftsmen to furnish schoolhouse plans and inspection service to county boards of education?

"2. Can the State Board of Education use a portion of the twenty per cent of the Revolving Fund for the purpose of employing a temperance worker to assist boards of education in promoting temperance instruction in their schools?

"3. Can the State Board of Education use a portion of the twenty per cent of the Revolving Fund for the purpose of furnishing school registers, accounting forms, and other printed materials which are needed in the public schools of the State?

"Neither county boards of education, nor city boards of education, nor the State Board of Education have adequate appropriations to provide the services set forth in the three questions listed above. Appropriations for 'Other Current Expenses' and for 'Capital Outlay' to county and city boards of education were reduced approximately seventeen per cent during 1936-37 in order to provide for additional teachers that were necessary for these boards to employ due to increased school attendance. The regular appropriation to the State Board of Education for the purpose of supporting the State Department of Education is all budgeted and is inadequate to provide the additional services described in the questions asked."

I am of the opinion that each of your questions should be answered in the affirmative.

Section 2 of an Act approved September 2, 1935, 1935 General Acts, page 751, makes provision for a Revolving Fund which is "to be expended in relieving emergency conditions that arise in connection with the operation of the public schools **or in otherwise aiding** the public schools, and to be expended in accordance with the provisions of the statutes relating to the expenditure of such funds." (Emphasis ours).

Section 59 of the 1927 Alabama School Code provides as follows:

"The State Board of Education is specifically charged with the duty of equalizing public school facilities throughout the State, in so far as it may be practicable; and in order to make it possible to increase the length of school terms in rural districts, and to care for that and other worthy purposes for which no adequate appropriation has been made, the said State Board of Education shall expend so much as it may deem proper of the amount set aside annually by legislative enactment as a revolving fund for the use of the State Board of Education, provided at least eighty per cent of the amount appropriated, if used, shall be expended for lengthening of public school terms and otherwise bettering conditions in rural schools, and that any unexpended balance at the end of any fiscal year shall be placed to the credit of the General Educational Fund."

The primary limitation placed upon the expenditure of twenty per cent of this fund is that it shall be used for worthy purposes "for which no adequate appropriation has been made," and in "aiding the public schools."

I am of the opinion that each of the purposes set out by you is in aid of public schools, and you state in your request that the funds otherwise available for these purposes are inadequate.

I am of the opinion that not exceeding twenty per cent of the Revolving Fund may be spent for the purposes suggested by you, under the restrictions prescribed in Section 59 of the 1927 School Code.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 13, 1937.

Hon. J. W. Rutland,
Tax Assessor,
Colbert County,
Tuscumbia, Alabama.

Taxation — Homesteads — Act 107 — General Acts, 1936-37, p. 113 — Rural and City property discussed.

1. Property actually occupied and cultivated by owner of land claimed as homestead is, within lawful area and assessed value, exempt from State taxes.

2. Owner may not select homestead out of land which he does not occupy and claim it as exempt from State taxes.

3. Rural property owned and cultivated by single person who lives in city, town or village is not exempt, as a homestead, from State taxes.

4. Rural property owned and cultivated by person who occupies rented house in city, town or village, is not exempt, as homestead, from State taxes.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your recent inquiry as follows:

"(1) B. I. Rutland wishes to claim homestead exemption on his farm of 160 acres, being the N½ of N½ of Section 23, Township 4, Range 13, which is farmed by himself with day labor. He eats and sleeps on the 80 acre homestead in Section 24, Township 4, Range 13 with his wife's aged mother.

"Would the case of temporary absence entitle Mr. Rutland to file said claim?

"(2) William K. Guthrie, a single man, owns land in West end of this County which he farms with day labor, however, he actually lives in Tuscumbia.

"Would he be entitled to homestead claim?

"(3) Mr. A. D. Sherrill, Tax Collector of this County and myself own lands in West end of County, but rent homes in Tuscumbia, and vote in Tuscumbia. We also operate our farm with labor and share croppers. Could we qualify for homestead exemption?"

It is my opinion that your first question should be answered in the negative. It appears from your statement of facts that the claimant does not live on any portion of the 160 acres which he desires to claim as exempt from payment of State taxes, but lives upon another tract.

Act No. 107, General Acts of 1936-37, p. 113, which authorizes exemption of homesteads from the payment of State taxes, defines a homestead as that which is defined by the Constitution and laws of Alabama.

The laws of Alabama require actual occupancy of property as a necessary incident to a homestead. The Courts have construed actual occupancy as existing when disconnected tracts are farmed in connection with each other and for the common support of the family. **Dicus v. Hall**, 3 So. 239, 83 Ala. 159. See opinion of this office to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama dated the 10th day of August, 1937. Actual occupancy, except in cases of temporary absence, is essential to constitution and retention of homestead in Alabama. **Hodges v. Hodges**, 77 So. 741, 201 Ala. 215.

The Courts of Alabama have also held that a tract of land actually owned by claimant may be tacked on to property which he has leased, and both tracts, if within lawful area and value, and if cultivated in common for family support, may be claimed as a homestead. **Bailey v. Dunlap Mercantile Company**, 35 So. 451, 138 Ala. 415.

The statement of facts presented in the first paragraph of your letter does not disclose any actual occupancy by Mr. Rutland on the 160 acres of land which he desires to claim exempt as a homestead. There is no actual residence thereon as contemplated by law. The house in which he actually resides upon an 80 acre tract is no part of the 160 acres. This 80 acre tract would have to be included as a part of any homestead claim which Mr. Rutland would be lawfully authorized to file. There is no authority of law for a claimant to select his homestead exclusively out of property upon which he does not reside.

With reference to your question presented in paragraph of your letter marked (2). It is my opinion Mr. Guthrie would not be entitled to claim a homestead in the lands which he owns in the West end of the County. A different rule seems to prevail as to city, town, or village property and as to rural property.

The Constitution of Alabama, as interpreted by the Court in the case of *Seabury et al v. Hemley*, 174 Ala. 116, makes the distinction. Justice Anderson speaking for the Court said as follows:

"The proof shows that the mortgagor Frismuth resided upon a tract of land owned by him within the village of Whistler, and the land in question was disconnected therefrom and was located without the bounds of said town or village. It was not, therefore, a part of the homestead under the Constitution of 1868. *Garner v. Bond*, 61 Ala. 84. It is also questionable whether or not it would be under the present Constitution, for our court in the case of *Tyler v. Jewett*, 82 Ala. 93, 2 So. 905, in dealing with the homestead in a city, said through Clopton, J.: 'We have, therefore, as postulates, that the right to homestead exemptions does not depend on the nature of the title, or the degree or character of the estate, but will be determined by occupancy and uses, and that a homestead may consist of two or more adjoining pieces of lands, so connected, occupied, and used as to constitute, in contemplation of law, one tract.' A different rule seems to prevail as to the homestead not within a city, town, or village—*Dicus v. Hall*, 83 Ala. 159, 3 So. 239. While the homestead provision has been liberally construed, so as to avoid the unmixed evil and misfortune of a homeless population, the Constitution cannot be so construed as to combine property within and also beyond the limits of a city, town or village, so as to stamp the two together as one homestead. There is a marked distinction between a homestead in the county and one within a city, town or village.—*Dicus v. Hall*, *supra*."

An examination of the Constitutions of 1868 and of 1901, reveals almost identical homestead provisions so far as city and real property are concerned. The interpretation by the Court of the constitutional provision of 1868, allowing homestead exemptions, has application to the present provision of the Constitution of 1901 granting homestead exemptions for the reason that the two provisions are substantially identical. Therefore, the rural property owned by Mr. Guthrie cannot be tacked on to the property which he occupies in Tusculumbia so as to permit Mr. Guthrie to claim rural property as a homestead and thus entitle him to an exemption from the payment of State taxes.

Referring to the Question presented in paragraph marked (3) of your letter, it is my opinion that, according to the foregoing rule, you would not be permitted to tack your rural property on to the property which you lease in town and claim it as exempt from payment of State taxes. However, there might be some facts not disclosed in your letter which would entitle you to claim some of your rural property exempt from payment of taxes.

If you left your rural homestead with the intention of returning at some future date, and have not rented it out under such circumstances as to establish the relation of landlord and tenant, other than a tenancy at will or at sufferance, and if at the time you left you intended to return, and such intention has continued until this time, you would be lawfully authorized to claim the rural property which you actually occupied as a homestead as exempt from the payment of taxes. If you left with an intention to return, and such intention has continued, but you have rented the property under such circumstances as to constitute a relation of landlord and tenant, other than at will or sufferance, and you have failed to file in the probate office a declaration of your intention to return in accordance with Section 7883, Code of Alabama, 1923, you would not be en-

titled to claim such property as exempt from the payment of State taxes. **Smith Lumber Company v. Gary**, 80 So. 857, 202 Ala. 473; **Miles v. Miles**, 99 So. 187, 211 Ala. 26, **Hollis v. American Wholesale Corporation**, 120 So. 204 215 Ala. 644, **Trapp v. First National Bank**, 117 So. 197, 217 Ala. 587; **Shaddix v. Bilbro**, 127 So. 227, 220 Ala. 657.

In writing this opinion, in giving you a negative answer to your question (3), I am assuming that facts do not exist which constitute your absence from your homestead as temporary. If, as I have outlined above, your absence from your homestead is merely temporary, that is, at the time you left you had an intention to return and such intention continued, you did not rent out the property in such manner as the relation of landlord and tenant, other than at will or sufferance, was established, but you rented it in such manner that you could return at any time you desired, no exclusive possession being vested in the tenant, then you would be entitled to claim homestead exemptions, and my answer to your question should be withdrawn, and an affirmative answer given you. I direct your attention to Section 8807, Code of Alabama, 1923, which sets out facts that will constitute the relation of landlord and tenant.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 13, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Section 201 of the Revenue Act of 1935 — Taxation — Redemption — State, County and city tax sales by Judge of Probate.

1. Probate Court has jurisdiction to render decree of sale for municipal taxes where ordinance adopted pursuant to Section 201, Revenue Act of 1935.

2. Redemption of land sold for municipal taxes pursuant to Section 201, Revenue Act of 1935, made through the probate office in the same manner as redemption from sale for state and county taxes.

3(a) If land sold to the State for State and county taxes, Probate Judge cannot require payment of city taxes upon redemption from such sale.

(b) If sold to person other than the State for State and county taxes, Probate Judge can collect all taxes upon redemption.

4. If land sold for state, county and city taxes, the Probate Judge, as a condition to redemption of property sold for state and

county taxes, is not required to demand redemption of the property from a sale for city taxes pursuant to Section 3095 of the Code of Alabama of 1923, now appearing as Section 201 of the Revenue Act of 1935, (General Acts 1935, page 256) prescribing machinery for assessment and collection of city taxes, such redemption being entirely separate and independent.

5. Probate Judge permitting redemption of property sold to city for city taxes, pursuant to Section 201, Revenue Act of 1935, required to collect money for which lands were sold for taxes, plus money due for subsequent year's taxes.

6. If property sold to purchaser other than city for city taxes, pursuant to Section 201, Revenue Act of 1935, Probate Judge permitting redemption from such sale required to collect the amount for which land sold with interest at six per cent, together with all taxes paid or assessed.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

Reference is made to your inquiry of recent date, which I quote as follows:

"Recently arrangement has been made by certain cities and towns in Colbert County for the County Tax Assessor to assess and the County Tax Collector to collect the municipal taxes of such cities and towns.

"Now since the Tax Assessor and Tax Collector of the County will assess and collect such taxes please advise me whether in the enforcement of the collection of such taxes the Probate Court would have jurisdiction to render a decree of sale for such municipal taxes.

"Please also advise me whether the redemption of real estate sold and municipal taxes will be made through the Probate Office and whether or not as Probate Judge I have any duties in connection with the sale or redemption of land which may be sold for municipal taxes.

"Please also kindly advise me whether I should require a tax payer who redeems through my office from a sale for state and county taxes to also pay the municipal taxes which may be due upon the property at the time the tax payer redeems.

"In other words I desire to know whether or not this new arrangement which has been made for the County Tax Assessor and Tax Collector to assess and collect the taxes of these cities and towns places upon me any duties in connection with the enforcement of the collection of such taxes the sale of such property for the payment of municipal taxes or the redemption of such property from a tax sale;" and also to your subsequent inquiry as follows:

"I desire to know what duties I have to perform with reference to the collection of city taxes where the property has been sold for State, County and City taxes and the owner seeks to redeem through my office.

"1. In the event there is a sale of real estate for State, County and City taxes and subsequently the owner applies to this office to redeem shall I require the payment through this office of the city taxes that accrued as well as the state and county taxes?

"2. If you rule that I should collect the city taxes through this office upon redemption please also advise me whether I should also collect all back taxes that have accrued in favor of the city as well as the city taxes for which the property sold.

"3. In the event real estate has sold for state and county taxes prior to the time that these ordinances were passed requiring the assessment and collection of city taxes by the County Tax Assessor and County Tax Collector, and the owner desires to redeem from such tax sale made for state and county taxes should I ascertain the amount of city taxes that have accrued and collect this before allowing redemption from the state and county tax sale?"

Under the provision of Section 3095, Code of 1923, now appearing as Section 201, Revenue Act of Alabama of 1935 (Act No. 194, General Acts 1935, page 256), it is provided:

"Any municipal corporation in this state may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality by the officers and boards provided in this chapter, and all the machinery herein provided for the assessment, equalization and collection of state and county taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes, and the redemption from such sales."

*no change
in 2/27*

This statute was originally enacted into law as Section 239, Revenue Act of 1919, Acts of 1919, page 352. Immediately following said section in the Revenue Law of 1919, appeared the section providing for the sale of lands for taxes by the order of the Probate Court, which provisions have not materially been changed and appear in the Revenue Law of 1935, as amended by the Acts of the Extra Session of 1936 as Section 201 and Section 324, et seq. This Section 3095 of the Code of 1923 appears in Chapter 58 of the Code of 1923, "Taxation," and therefore all of the provisions of that Chapter 58 of the Code of 1923 apply to the assessment, collection and sale of the property for collection and the redemption from such sales for the municipal taxes. The duty of the Judge of Probate as to sale for such municipal taxes and the jurisdiction of such proceedings is therefore the same as to sale of lands for taxes due to the State. In my opinion, therefore, where the cities have adopted the proper ordinance pursuant to Code Section 3095, now appearing as Section 201 of the Revenue Law of 1935, you have the same jurisdiction and should follow the same procedure for the sale of lands for such municipal taxes as has been followed for the sale of lands for taxes due the State or county.

2. Your second question is whether the redemption of real estate sold for municipal taxes will be made through the Probate Office and whether or not as Probate Judge you have any duties in connection with the sale or redemption of land which may be sold for municipal taxes. Your inquiry as to your duties in connection with the sale for municipal taxes has

been answered above. Under the provisions of said Code Section 3095 and Section 201 of the Revenue Law of 1935, all provisions for redemption from tax sales applicable to State and county taxes apply to such sales for municipal taxes under said Act. Such redemption, therefore, must be made through the Probate Office in the same manner and you are subject to the same duties in regard to such redemption that you are in respect to the redemption of lands sold for State and County taxes.

3. Your next inquiry is whether you should require a taxpayer, who redeems through your office from a sale for State and County taxes, to pay the municipal taxes which may be due upon the property at the time the taxpayer redeems. Where such land has been sold to the State for State and County taxes, the provisions of Section 269 of the Revenue Law of 1935, as amended by the Act of the Extra Session of 1936, Chapter 30, governs such redemption and the amount which must be paid by the taxpayer. It is provided in said section that the Probate Judge must submit the application for redemption to the Tax Assessor of the county in which the land was located, who must enter an assessment value for each of the year for which taxes are due. Sub-section (c), as amended, provides:

"The redemptioner shall deposit with the Probate Judge the amount of money for which lands were sold for taxes plus the amount of money due for subsequent years based on the assessment value as required to be fixed in sub-section (b) of this section and interest, costs and fees, as provided in sub-section (a) of this section."

No provision is made in that section for the collection of municipal taxes, and, in my opinion, where such lands have been sold to the State, you have no authority to require a taxpayer redeeming from the sale for State and County taxes to pay taxes due the municipality. Any contrary conclusion would adversely affect the State in its rights to have the property redeemed and to secure its tax money promptly.

(b) If such property has been sold for State and county taxes to a purchaser other than the State, the amount to be paid on redemption is governed by Section 270 of the Revenue Act of 1935. It is there provided that the taxpayer redeeming should deposit in the office of the Judge of Probate the amount of money for which the land was sold, with interest thereon at the rate of six per cent per annum, from the date of sale:

"Together with the amount of all taxes which have been paid by the purchaser, which fact shall be ascertained by consulting the records of the Tax Collector, with interest on said payment at six per cent per annum. If any taxes on said land have been assessed to the purchaser and have not been paid, and if said taxes are due which may be ascertained by consulting the Tax Collector of the County, the Probate Judge shall also require the party desiring to redeem said land to pay the Tax Collector the taxes due on said lands, which have not been paid by the purchaser before he is entitled to redeem the same."

In my opinion, the words "all taxes" as used in said section would include municipal taxes where the city has adopted the ordinance required. It is, therefore, my opinion that if the property has been sold for State and County taxes to a purchaser other than the State, upon application for redemption you should require the deposit for the amount of money for which the lands were sold with interest thereon at the rate of six per

cent per annum, together with all taxes both State, county and municipal which have either been paid by the purchaser or assessed to the purchaser and have not been paid but are due.

4. Your next inquiry is: "In the event there is a sale of real estate for State, County and city taxes and subsequently the owner applies to this office to redeem, shall I require the payment through this office of the city taxes that have accrued as well as the State and county taxes?" This office has previously ruled that such sales for State and county taxes and such sales for municipal taxes must be separate sales. See also opinion to Hon. A. D. Sherrill, Tax Collector, Colbert County, Tuscumbia, Alabama under date of July 2, 1937. If the redemption referred to is from a sale for State and county taxes, your inquiry as to city taxes has been answered above.

There is a further question included in your inquiry as to the right to require a redemption from city taxes at the time of such proposed redemption from state and county taxes. I refer you to Section 2129 of the Code of Alabama of 1923, which I quote as follows:

"Section 2129. Tax sale; title of.—Cities and towns shall have a lien for taxes upon all property assessed for taxation, which shall be superior to all other liens, except for taxes held by the state and county."

In view of the fact the State and County lien for taxes is superior to the lien for municipal taxes on the same property, you have no authority under the laws of Alabama, except in special cases where there has been a specific act of the Legislature placing a lien for city taxes on a parity or equal basis with the lien for State and county taxes, to require redemption of the property from the sale for payment of the city taxes as a condition to redemption of the property from a sale for payment of State and county taxes. Otherwise you would be placing the lien for city taxes on an equal basis with the lien for State and county taxes in conflict with the provisions of Section 2129. Although the Act, *supra*, provides that the machinery of the State of Alabama may be used for the assessment and collection of city taxes, there was no expressed intention on the part of the Legislature to make redemption from State tax sales and from city tax sales dependent upon each other and to place the lien of city taxes on an equal basis with the lien for State taxes. The redemptions are several and distinct and in no way related. It is therefore my opinion that upon the redemption of property from a sale for the payment of State and county taxes, you are not required as a condition thereto to demand redemption of property from a sale for city taxes, pursuant to Section 3095 of the Code of Alabama of 1923, now appearing as Section 201 of the Revenue Act of Alabama, General Acts 1935, page 256.

Such redemptions from sales for city taxes and from sales for State and county taxes being separate and distinct, it is further my opinion that if redemption is sought to be made through your office from a sale for city taxes, you have no authority to require a redemption from a sale for State and County taxes.

5. In the event redemption is sought to be made from a sale for city taxes, the amounts to be collected by you are governed by the appropriate provisions of the laws governing redemption from sales for State and county taxes, since the effect of the adoption of ordinances pursuant to said Section 201 of the Revenue Act of 1935 is to provide the same machinery and re-

quirements for redemption from city taxes as are provided by said Act for redemption from State and county taxes. If said property is purchased by the city at sale for city taxes, pursuant to said section, it is my opinion that you should collect the amounts provided by Section 269 of the Revenue Law of 1935, that is the amounts required to be collected for sales of property to the State for State and county taxes. These amounts and this section are set out above.

6. If such property is sold for city taxes to a purchaser other than the city, it is my opinion that redemption from such sale is governed by the provisions of Section 270 of the Revenue Act of 1935, set out above, and upon such redemption you should require the deposit of the amount of money for which the land was sold with interest thereon at the rate of six per cent per annum, the amount of all taxes paid by the purchaser with interest at six per cent per annum and the amount of all taxes assessed to the purchaser and not paid but due. I believe this answers all the questions asked in your two inquiries.

This opinion has no application to Jefferson County; nor to cities within a population range of not less than 6500 or more than 15,000, governed by Act No. 300, General Acts of Alabama, 1931, page 337; nor to the City of Auburn, nor to any other city in the State which is governed by a strictly local or general law with local application contrary to the provisions of the statutes herein cited.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 14, 1937.

Hon. J. N. Baker, M. D.,
State Health Officer,
Department of Public Health,
Montgomery, Alabama.

County Budget Act—

Court of County Commissioners may amend current year's budget so as to include the additional revenue accruing from sales and beverage taxes.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 16, 1937, in which you request my opinion as follows:

"Your opinion is sought on the following question:

Under the County Budget Act has a court of county commissioners the privilege of amending a current year's budget so as to include revenue accruing from the sales and beverages taxes; and to substitute same for items already set up in the budget?"

In my opinion, the Court of County Commissioners has the authority to amend a current year's budget so as to include the additional sales and beverage taxes Cf Opinion to Board of Revenue and Road Commission of Mobile County, dated June 11, 1937.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Porter McKay,
Official Court Reporter,
19th Judicial Circuit,
Wetumpka, Alabama.

Statutes — General Act reading "according to the last preceding or any subsequent Federal census" means census preceding reclassification from time to time and not preceding passage of Act.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge receipt of your letter of July 13th, 1937, which is as follows:

"I enclose herewith caption of an Act approved by the Legislature of Alabama, on June 18th, 1931. This Act was drawn by Judge Geo. F. Smoot, and the intention of the act was to supplement the salary of the Court reporter for the 19th Judicial Circuit.

"After the passage of the Act of the Legislature, I went before the Court of County Commissioners of Chilton County, and passed a resolution supplementing my salary \$75.00 a month, for a term of one year. The resolution was entered on the minutes, and afterwards changed so as to 'unanimously pass it over until the next meeting of the Court of County Commissioners', after it was called up on motion of one of the members, and 'unanimously passed.' The words 'over until the next meeting of the court of County Commissioners' being added.

"The population basis was figured by Judge Smoot at the time the bill was drawn, and then after the passage of the resolution by the Commissioners Court in July 1931, when I went to Clanton and fixed up a contract Mr. Omar Reynolds, County Attorney, and I figured on the population at that time, and it was within the limits.

"Another Probate Judge is now in Chilton County, and new County Commissioners, and I got this matter up to the point the matter was to be voted on, on July 5th, when Mr. Omar Reynolds who is still County Attorney raised the proposition about the population limitation, and the Commissioners Court, and Probate Judge requested that I get your opinion on the population proposition at this time. It has now been six years since this act was passed, and six years since the matter was passed by the Commissioner Court—and then the minutes changed—so as not to pass it.

"Judge Smoot evidently took the population by the Federal census of 1910, as the last preceding census, and the population at the end of 1920, as the next succeeding census—as the 1930 census was not out, as I understand it until sometimes after 1931—and was not out at the time Judge Smoot figures the population basis—or limitation.

"I have written you quite at length on this proposition—in order that you might see the situation in reference to this matter.

"The whole intent and purpose of the act was to apply to the 19th Judicial Circuit. Of course, six years after the act was passed makes a difference in the population—but the circuit population was within the "limits when the act was passed—and when the attempt was made to put it in force.

"The proposition the Probate Judge and Commissioners Court asked me to get your opinion on, is as to the population, as stated in the caption of the act.

"If you can give me the opinion of your office on this proposition, I will appreciate it very much."

"To authorize and empower the County Commissioners, Boards of Revenue, Courts of County Revenue or Boards or Courts of like Power in any County in a Judicial Circuit composed of three Counties, and having one Circuit Judge, where the total population of said Circuit is not less than 65,000 and not more than 72,000, according to the last preceding or any subsequent Federal census, to contract with the Court reporter of said Judicial Circuit, to report testimony in Equity cases in the Court of such county, to provide for the disposition of the fees for such reporting, and to fix the compensation supplementary and in addition to the salaries paid to such court reporters by the Judicial Circuits of the State, in consideration of said reporters reporting testimony in certain Equity cases, certain preliminary trials and habeas corpus and contested will cases before Probate Judges.

"General Acts 1931, page 333."

In answer to your inquiry, advise that in my opinion it is a question of fact which determines whether or not the 19th Judicial Circuit comes within the province of Act No. 283, General Acts 1931, page 333.

It is a long established rule of statutory construction that the words "according to the last preceding or any subsequent Federal census" mean the

last census preceding reclassification from time to time, and not to the census immediately preceding the passage of the Act.—*State v. McLellan*, 202 Ala. 41, 79 So. 379; *Board of Revenue of Jefferson County v. Huey*, 195 Ala. 83, 70 So. 744.

Since the 19th Judicial Circuit has a population of 78,553 according to the last official Federal census, the provisions of Act No. 283, *supra*, are not applicable to said circuit. These figures, taken from the **Official and Statistical Register** of Alabama for 1935, are based on the Federal census of 1930.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—

1. Probate Judge, on signing a decree for sale against a piece of property delinquent for taxes, does not assume any responsibility for the accuracy of the figures contained in said decree, provided, of course, that the figures contained in the decree are in accordance with the figures furnished him by the Tax Collector, as provided by Sections 215 and 216 of the Revenue Act of 1935.

2. Tax Collector is responsible for the accuracy of figures furnished by him to the Probate Judge in accordance with the provisions of Sections 215 and 216, *supra*.

3. If an error in said figures furnished by the Tax Collector to the Probate Judge is due to an error in the figures furnished the Tax Collector by the Tax Assessor, then, of course, the Tax Assessor and not the Tax Collector would be responsible for the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 9, 1937, as follows:

"Do I, as Probate Judge, on signing a decree of sale against a piece of property delinquent for taxes assume any responsibility for the accuracy of the figures contained in said decree—particularly interest from date of delinquency to the date of sale—such figures, of course, having been supplied me by the Tax Collector? If this responsibility does not adhere to me, then please state to what officer it does attach."

In my opinion, you, as Probate Judge, on signing a decree of sale against a piece of property delinquent for taxes, do not assume any responsibility for the accuracy of the figures contained in said decree, provided, of course, that the figures contained therein are in accordance with the figures furnished you by the Tax Collector in accordance with the provisions of Sections 215 and 216 of the 1935 Revenue Act. These sections provide as follows:

"Section 215. It shall be the duty of the tax collector, at the expense of the county, to procure a substantially bound book in which he shall enter, in the manner usual in docketing causes for trial in the circuit court, each parcel of real estate, or right or interest, or easement therein, assessed to any person against whom taxes have been assessed which are not paid, when a portion of all such taxes are on such real estate, or right or interest or easement therein, describing the same in the same manner as it is described in the assessment list, and stating the amount of the unpaid taxes, penalties, fees and charges due by such person, specifying the amount due the State, and due the county, and to special tax districts, and that for fees and charges; and he shall in like manner, enter in such book each parcel of real estate, or right or interest or easement therein, which has been assessed to an 'owner unknown' the amount of taxes, fees and charges due thereon, stating in each case the fact that it was so assessed. The description of such real estate, or right or interest or easement therein, shall be entered in alphabetical order, if known, and they reside in the county, but if they are unknown and do not reside in the county, then by the precincts in which the real estate is situated."

"Section 216. Such book shall be prepared in a neat and orderly manner either in a fair and legible handwriting or typewritten with sufficient space in each case to make the necessary entries, and in other particulars, in a manner suitable for the purpose for which it is to be used; and if it is not thus prepared, the judge of probate shall cause it to be so prepared at the expense of the collector, and the cost thereof shall be deducted from his compensation. Such books shall be delivered to the judge of probate on or before the first day of March; but if from any cause there has been a failure to deliver the same by that time, it may be delivered thereafter."

Therefore, it seems very clear that the responsibility for the accuracy of these figures devolves upon the Tax Collector who is charged, by the provisions of the Revenue Act, *supra*, with the duty of furnishing the same to you, and not upon you, as Probate Judge.

Of course, if there was an error in the figures so furnished you by the Tax Collector, which error was due to an error in the figures furnished to the Tax Collector by the Tax Assessor then the Tax Assessor, and not the Tax Collector, would be the official responsible for the error, since he was the official who made the error.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. J. A. Moody,
Register, Circuit Court,
Colbert County,
Tuscumbia, Alabama.

Register of Circuit Court in Equity held without authority to issue an attachment for the arrest and commitment to jail of a person in contempt of court for non payment of alimony according to a decree of the court, the same being within the province of the judge or chancellor of said court and not the register thereof.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter which follows:

"I desire a ruling from your office in regard to my duties under Article 34 of Chapter 267 of the Code.

"The Judge of the Circuit Court in Equity has rendered a decree ordering the payment of alimony. The defendant against whom the decree was rendered has failed to pay alimony according to the decree. The complainant in the case has filed with me, as Register of said Court, an affidavit showing the failure of the defendant to pay the alimony which the defendant was directed to pay by the decree.

"Please advise me whether I, as Register, have authority to issue an attachment for the arrest of the defendant and for his committal to jail until he makes such payment."

Section 6646, Code of Alabama, 1923, contains the law giving authority to Circuit Courts in Equity to enforce their decrees, orders or rules by attachment against a party in contempt for non compliance therewith. This section reads as follows:

"Circuit courts in chancery or equity proceedings may also enforce their decrees, orders and rules by process of attachment against the party or officer in contempt, or by process of sequestration against his property."

If a party fails to comply with an order or decree of your Circuit Court in Equity, such as failing to pay alimony in accordance with a decree of the court calling for the payment of the same, as the party mentioned in your letter has done, then, the Judge or Chancellor of your court may, in accordance with the authority granted to him by Section 6646, supra, adjudge the party in contempt of Court for failing to comply with the order and may issue an attachment against him for his arrest and commitment to jail. However, this is a matter that is within the province of and addresses itself to the Judge or Chancellor and not to the Register. Of course, if the Judge or Chancellor adjudges the party in contempt and orders an attachment to issue against him for his arrest and commitment to jail, then, of course, you, as Register, should issue the attachment, but you are without power or authority to do so unless you are so ordered by the Judge or Chancellor of your court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. L. J. Lawson,
County Treasurer,
Hale County,
Greensboro, Alabama.

Fine and Forfeiture Fund—Lost claims against, duplicates authorized.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your letter of May 10, 1937, in which you state:

"The Circuit Clerk of Hale County has filed with me a claim covering a number of fees against the Hale County Fine & Forfeiture Fund. He advises me that the original claims have been lost or misplaced by him and the ones mentioned above are duplicates. The originals have never been registered. There are now funds in this account sufficient to pay the duplicate claims. Should the originals show up at any time in the hands of an innocent holder would I, as County Treasurer, be responsible for the payment of them? I hope you will be able to help me out on this as soon as possible."

In my opinion there can be no innocent holder of the lost original claims or certificates against the Fine and Forfeiture Fund. Upon affidavit by the Circuit Clerk that the original certificates are lost, it is my opinion you are authorized to pay duplicate certificates.

In an opinion of this office under date of October 9, 1935, to the State Comptroller (Quarterly Report of Attorney General, Vol. I, p. 37) it is stated:

"A perusal of Section 303 (5) will show that registration is no indicia of the legality of the claim, but merely a mode of designating the order in which such claims must be paid."

This office has also held in an opinion, under date of October 4, 1928, to the Clerk of the Circuit Court of Houston County (Biennial Report Attorney General, 1928-1930, p. 14) that the Circuit Court is authorized to issue duplicate witness certificates where the original ones have been lost. As the clerk has a record of all certificates, he is able to locate by numbers the stub of a lost certificate and make a notation that a duplicate has been issued.

By the same reasoning, I am of the opinion that the Clerk of the Circuit Court has authority to issue a duplicate for any lost certificate against the Fine and Forfeiture Fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hin. J. P. Mitchell,
Judge of Probate,
Abbeville, Alabama.

Where deed offered for recording recites payment of cash amount with balance deferred, a mortgage tax should be charged on basis of amount shown as deferred payment and deed tax should be on difference between this amount and value of the property.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter which reads as follows:

"A deed containing the following as a consideration has been filed in this office for record.

"That for and in consideration of Two Thousand Dollars, and purchaser's agreement to buy Capital Stock of the Federal Land Bank of New Orleans in an amount of Forty-five dollars, Four hundred dollars of which amounts has been paid in cash, the receipt whereof is hereby acknowledged, and One thousand six hundred forty-five dollars of which representing the deferred balance, is evidenced by 2 amortization notes * *

"Would it be proper to charge a filing tax on the sum of \$2,000.00 or on the sum of \$2045.00?"

I am of the opinion that a mortgage tax should be collected on the basis of \$1645.00 and that a deed tax should be collected on the basis of the difference between \$1645.00 and the value of the property. While the instrument indicates that the property is not worth over \$2045.00, nevertheless the value may be greater than this amount.

The rule to be followed is laid down by the Court of Appeals in the case of **Thompson v. Smith**, 174 So. 796, Cert. Den. 174 So. 797 as follows:

"We think there can be no doubt that 'the determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the Probate Judge.' **Long, Judge v. Jasper Land Co.**, 217 Ala. 593, 117 So. 210.

"True, he 'may accept as **prima facie** correct the recitals of the deed (or bill of sale, we interpolate) — — and may act accordingly, in the absence of any fact or circumstance to the contrary, coming to his attention calculated to put on notice a reasonably prudent person.' (Emphasis supplied). **Long, Judge v. Jasper Land Co.**, *supra*."

I am, therefore, of the opinion that a mortgage tax should be collected on the basis of \$1645.00 and deed tax on the difference between this amount and the value of the property.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—

Tin shop and roofing shop operator also accepting orders or contracts for work on or in building requiring use of paint, tin, lead, etc. required to secure both tin shop license, under Schedule 110, and contractor's license, under Schedule 42 of Section 348 of Revenue Act of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 1, 1937, in which you request my opinion as follows:

“The operator of a local tin and roofing shop has paid the license provided for under Schedule No. 110 of the Revenue Act of 1935. It is admitted that this contractor confines his activities exclusively to the roofing and tinning business but that he does make contracts in connection with the operation of this shop.

“The operator of this shop has been cited by the Montgomery County License Inspector for failure to also secure a general contractor's license under Schedule No. 42 of the same act.

“Please advise me as to whether or not both of these licenses are assessable under these circumstances.”

In my opinion, an operator of a tin and roofing shop who makes contracts in connection with the operation of such a shop must secure the license imposed upon “any person, firm or corporation accepting orders or contracts” by Schedule 42 of Section 348 of the General Revenue Laws of 1935. This Schedule, insofar as pertinent to your inquiry, provides as follows:

“Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead electric wiring or other steel, or any other building material * * *, shall be deemed a contractor.”

Schedule 42 then proceeds to impose a license on an ascending scale upon every “such contractor.”

Your attention is specifically directed to the case of **Hill Grocery Company v. State**, 26 Ala. App. 302, 304, wherein Judge Bricken, speaking for the Court of Appeals, said:

“* * * when a license to do a general business has been exacted and such license paid another license cannot be required and collected for the doing of a part of a particular act, or series of acts, constituting an integral part of such business. Mayor and Alderman of City of Tuscaloosa v. Holczstein, 134 Ala. 636, 32 So. 1007; Gambill v. Endrich Bros., et al., 143 Ala. 506, 39 So. 297; City Council of Montgomery v. Kelly, 142 Ala. 552, 38 So. 67, 70 L.R.A. 209, 110 Am. St. Rep. 43, and cases cited. The general rule above announced is a safe rule of construction of laws imposing occupation taxes or license. It simply means, in the absence of express words disclosing a different intent, that they were not intended to subject the same business to double taxation or license for the exercise of the same privilege.” (Emphasis supplied).

The Legislature of Alabama has seen fit to specifically disclose its intention by express words to impose both the contractor's license and the tin shop license on a party operating as is the party operating as detailed in your letter, by the provision found in Section 357 of the 1935 Revenue Laws found on page 447 of Simons' Code, which Section reads as follows:

“Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor.”

I therefore advise you that the party operating the tin roofing shop must procure a contractor's license where he accepts contracts for doing work on or in any building or structure requiring the use of paint, tin, lead, etc., as provided by Schedule 42 of the 1935 Revenue Laws. Compare Biennial Report, 1922-24, page 402.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. Henry S. Long, President,
State Tax Commission,
Capitol.

August 17, 1937.

Attention: Mr. Harry Simon.

Licenses—

1. Person operating a vending machine for cigarettes who does not sell any other tobacco products and who does not sell cigarettes in any other manner than through said machine, is not required to pay, in addition to the license levied on the privilege of operating such machine by Schedule 154 of the 1935 Revenue Act, as amended by H. B. No. 70, p. 32, Extra Session, 1936-37, the license levied by Schedule 32 of the 1935 Revenue Act for the privilege of selling tobacco products at retail.

2. Person selling tobacco products generally at retail is liable for the payment of the license levied by Schedule 32 of the 1935 Revenue Act for such privilege, and is not liable for the license levied by Schedule 154, as amended, *supra*, for the privilege of operating a vending machine selling cigarettes, even though he sells cigarettes in such a manner.

3. The maximum license which a municipality can levy on a person operating a cigarette vending machine for the privilege of operating such machine within the municipality is 50% of the license levied for such privilege by the State, under Schedule 154 if the 1935 Revenue Act, as amended, *supra*.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 22, 1937, which follows:

"Your opinion is requested as to whether or not a person who operates a nickel-in-the-slot cigarette vending machine would in addition to the license required by Schedule 154, as amended by H. B. 70, Extra Session, 1936-37, State license \$8.00, county license, \$4.00, be required to procure, in addition to such license, a license as provided under Schedule 32, which levies a license on the sale of tobacco products. The person who operates this machine does not sell any other tobacco products than cigarettes and these are sold only through the vending machine.

"Your opinion is also requested as to the maximum license that any municipality can levy on the person operating a nickel-in-the-slot cigarette vending machine for the privilege of operating such machines."

Schedule 154 of the 1935 Revenue Act, as amended by H. B. No. 70, Extra Session, 1936-37, is the schedule levying a license on the privilege of operating a vending machine. This schedule, as amended, reads in pertinent part as follows:

"For each machine for vending gum, candy, cigarettes, music, or on which a person is weighed, or other articles: Where machine is operated by pennies, one (\$1.00) dollar; where machine is operated by nickel or coins of larger denomination, eight (\$8.00) dollars. Provided, that nothing in this schedule shall apply to machine installed by any person, firm, or corporation in its place of business, vending necessary articles on a non-profit basis for emergency use only by the employees of such person, firm, or corporation. Provided, that no license, for said vending machines, vending cigarettes shall be required under this Schedule where the license as provided under Schedule 32 of this Section shall have been obtained by the person operating the place of business in which said vending machine is located, or the owner of said cigarette vending machine shall have secured the license as provided under Schedule 32. Provided further, no municipality shall be allowed to levy and collect a license for the operation of vending machines enumerated and defined in this Schedule in an amount greater than fifty (50%) per cent of that levied by the State."

It will be noted that this schedule exempts a person operating such a machine which vends cigarettes from paying the license levied thereby if he or the owner of the machine has paid the license levied by Schedule 32 of the 1935 Revenue Act, which is the schedule levying a license on persons for the privilege of selling tobacco products at retail. If all persons who operate cigarette vending machines were required to take out the license levied by Schedule 32, *supra*, whether or not they sold any other tobacco products other than cigarettes, or cigarettes in any other manner than through said machines, then no person operating cigarette vending machines would be liable for the license levied by Schedule 154, as amended, *supra*, on persons for the privilege of operating vending machines selling cigarettes. The provisions of this schedule applying to vending machines selling cigarettes would be without a field of operation, and the legislature would have done a futile and useless thing. There is a presumption that the legislature will not do a futile and useless thing. Wherever possible statutes will be construed so as to give them a field of operation. Bearing these principles of law in mind, and construing the provisions of this schedule applying to vending machines selling cigarettes so as to give them a field of operation, it is my opinion: (1) A person selling cigarettes through a vending machine, who does not sell any other tobacco products, and who does not sell cigarettes in any other manner than through the vending machine, is subject to the license levied by Schedule 154, as amended, *supra*, for the privilege of operating such a machine, and is not liable for the license levied by Schedule 32, *supra*, on persons for the privilege of selling tobacco products at retail. (2) A person who sells tobacco products generally at retail must pay the license levied by Schedule 32, *supra*, for such privilege, and is not required to pay the license levied by Schedule 154, as amended, *supra*, for the privilege of operating a vending machine selling cigarettes, even though he might sell cigarettes in such a manner.

The above quoted provision of Schedule 154, as amended, provides that no municipality shall be allowed to levy and collect a license for the operation of a vending machine enumerated and defined in that schedule in an amount greater than fifty (50) per cent of that levied by the State. Such was within the legislative province. The legislature has the power and authority to prescribe the maximum amount of privilege licenses which municipalities may levy, though it cannot prohibit the municipalities from levying such licenses. By the provisions of Schedule 154, as amended, *supra*, the legislature has exercised this power and authority in regard to the amount of privilege license which a municipality may levy on vending machines. Therefore, a municipality may not levy a license on a person for the privilege of operating vending machines selling cigarettes within the municipality in an amount in excess of 50% of the amount of the license levied by the State for such privilege, which license is levied by Schedule 154, as amended, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. Roy Johnson,
Tax Assessor, Jefferson County,
Room 106 Court House,
Birmingham, Alabama.

Taxation—Property used for purely charitable purposes only one month of tax year not exempt ad valorem taxes for that year.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter which is as follows:

"Property was leased by the Alabama Transient Bureau from October 1, 1934 to October 1, 1935, which property was exempt from taxation during that time. The manager of the estate owning this property now asks that we exempt same for 1936 taxes because, after the expiration of the lease, the Alabama Transient Bureau occupied the building until some time in November and, immediately after they moved out, the building was razed. They are, therefore, claiming exemption for 1936 because the building was occupied a month and a half in the tax year of 1936."

In answer to your inquiry, I am of the opinion that the property in question is not exempt from the 1936 ad valorem taxes.

The exemption of this property for the 1936 taxes is claimed under the provisions of Section 2 of Act 194, H. 324, approved July 10, 1935, (General Acts 1935, p. 257), which provides in part as follows:

"Section 2. PERSONS AND PROPERTY. The following property and persons shall be exempt from ad valorem taxation and none other: * * * all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes; * * *."

Under said section the use of the property is the criterion in determining the exemption and not the ownership or the term of the lease.—**Quarterly Report, Vol. III, p. 155; Opinion of Attorney General to Tax Assessor, Jefferson County, September 13, 1935; State et al v. Church of the Advent, 208 Ala. 632, 95 So. 3.** The words "used exclusively" in the above quoted statute authorizing the exemption, in my opinion, means that the property must be "used exclusively" throughout the whole of the tax year to come within the exemption. Cf. **State v. Alabama Educational Foundation, 231 Ala. 11, h. n. 19.** If property is used for charitable purposes only for a portion of the tax year it would not be "used exclusively" for charitable purposes during that tax year. The exemption is not partial or pro rata. **Biennial Report Attorney General, 1918-1920, p. 393.** This is true although the property is assessed as of October 1st. To hold otherwise would allow a party whose

property is vacant to lease same on October 1st for a nominal consideration for purposes purely charitable for a few days, or a few weeks, and thus avoid payment of ad valorem taxes on his property. This, in my judgment, was not the intention of the exemption statute above quoted. Moreover, exemptions must be strictly construed.

The premises considered, it follows that under the facts set out in your letter, that the property is not exempt from the payment of the 1936 taxes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. S. M. Cobb,
Clerk of the Circuit Court,
Wilcox County,
Camden, Alabama.

1. No costs can be paid from the Fine and Forfeiture Fund in hard labor cases if the defendant has worked out his sentence for full costs.

2. Where a defendant is arrested for a felony and is later convicted of a misdemeanor, the Sheriff's arresting fee is \$4.00, in accordance with the original charge.

3. Sheriffs are entitled to their fees out of the Fine and Forfeiture Fund of the County in juvenile cases, where execution has been returned "no property found," as in other criminal cases.

4. Where costs are taxed against the defendant on a conviction under any conditions, execution must be returned against the defendant "no property found" before it can become a charge against the Fine and Forfeiture Fund of the county.

5. Where the Sheriff is allowed \$3.00 for summoning jury in a capital case, this fee attaches and is allowed each time the case is set down for trial and such jury is summoned.

4. The Sheriff under the law is entitled to \$3.00 for summoning jury in capital case. This is true even though the defendant is on the trial convicted of misdemeanor.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you request my opinion as follows:

"(1). If indicted for a felony and convicted for a misdemeanor can the Sheriff draw \$1.00 from the Fine and Forfeiture Fund of County not paid by the State under Section 3667?

"(2). Can the Sheriff collect from the County \$2.00 for arrest of a felony and for a misdemeanor when only \$2.00 is paid by the State in Hard Labor sentences for a misdemeanor but arrested for a felony?

"I refer you to the Acts of 1927, page 52 as to whether or not the State or County shall pay same under Section 3667.

"(3). Are the Sheriff's and Clerk's entitled to their fees from County or Fine and Forfeiture Fund in Juvenile cases, indicted by the Grand Jury for a felony and transferred by the trial judge of the Circuit Court to the Probate Judge, who is Judge of the Juvenile Court?

"(4). Is the Clerk of the Circuit Court entitled to his fees from the County or Fine and Forfeiture Fund for all fees under the General Law for fees in the Penitentiary and Hard Labor sentences not paid. Section 3667, and if you say that I am entitled to said fees from the County or Fine and Forfeiture fund, not paid, under Section 3667, in all State fail, nol pros. withdrawn, filed and abated by death cases? If so can I charge for the issuance of said executions? Or in other words am I required to issue executions before collecting same?

"(5). Is the State required to pay \$3.00 more than once for summoning jury in capital cases when arraigned more than once and sentenced to Penitentiary, and if not can he collect from the Fine and Forfeiture Fund for summoning juries in Capital cases?

"(6). When indicted for a capital offense and convicted for a misdemeanor and sentenced to Hard Labor for the County is the State required to pay for summoning the jury under Section 3667, or is the County required to pay for summoning said special juries when convicted and sentenced to Hard Labor for the County?"

In answering your request, I am presuming you have reference to cases where the sentence is to hard labor for the full amount of the costs and the convict has worked out the full amount of the costs in his sentence. My answer to your first request is in the negative, that is, if the defendant has been sentenced to hard labor for the costs and his sentence is long enough to pay the costs in full, the working out of his sentence would extinguish the costs. See Biennial Report of Attorney General, 1932-1934, page 436, and Quarterly Report of Attorney General, Vol. II, page 118.

Answering your second request, this office has held that where a defendant is arrested for a felony and is later convicted for a misdemeanor the arresting fee is \$4.00. Quarterly Report of Attorney General, Vol. I, page 116, and if the defendant has been sentenced to hard labor and served out his sentence only that part paid by the Convict Department can be collected. Biennial Report of Attorney General, 1932-1934, page 436, and Quarterly Report of Attorney General, Vol I, page 118.

Answering your third request, I call your attention to an opinion of this office written to Hon. C. E. Corprew, Sheriff Tallapoosa County, January 10,

1936. Quarterly Report of Attorney General, Vol. II, page 28. Here it is held that in Juvenile cases you are entitled to the same fees as in other criminal cases. This being true, whenever the case is disposed of and execution has been returned against the defendant "no property found," the cost should go against the Fine and Forfeiture Fund of the county.

Answering the first part of your fourth request, I call your attention to the fact that I have answered this in my answers to your first and second requests. Answering the second part of your request, my answer is in the affirmative. Execution must issue against the defendant and be returned "no property found" before this charge can go against the Fine and Forfeiture Fund.

Answering your fifth request, it is my opinion you are entitled to collect your fee for each time the case is set down and you are required to summons a special jury. Section 3667 says among other things "summoning jury in capitol cases, \$3.00" but does not say (once).

Answering your sixth request, this office has held that the Sheriff is entitled to \$4.00 for arresting defendant charged with a felony, although he was later convicted of a misdemeanor. Therefore, I am of the opinion you would be entitled to \$3.00 for summoning special jury for the trial of a capital offense, even though the defendant was later convicted of a misdemeanor. You would be entitled to such pay under Section 3667, Code of Alabama 1923 where it says "for summoning jury in capital cases."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1937.

Hon. R. E. Brownfield,
Tax Collector, Lee County,
Opelika, Alabama.

- ✓ 1. Tax Collector may collect tax on February 1st.
2. Taxpayer giving dishonored check in payment of poll tax has not paid poll tax and is not entitled to credit therefor, nor to have his name on poll list.
3. Tax Collector is not liable for issuing tax receipt to person who gives an uncollectible check in payment thereof.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Will you kindly give me your ruling on the following:

"1. Is it legal for a Tax Collector to sign and issue Poll Tax receipts on February 1st, or is the legal limit midnight January 31st?

"2. Is a Poll Tax receipt valid, and the holder thereof entitled to credit for the payment on the Poll List, when the bank check given in payment for the Poll Tax is not honored by bank upon which it was drawn? And when the Tax Collector makes diligent effort to collect the amount of the dishonored check from the taxpayer but fails, does the Tax Collector have to make good the amount to take care of the Poll Tax receipt, while the fraudulent taxpayer gets credit for having paid?"

In answer to your first inquiry, in my opinion, it is legal for the Tax Collector to sign and issue tax receipts on February 1st. Section 208 of the Revenue Code, as construed by this office in Quarterly Reports of the Attorney General, Vol. I, page 249, Vol. III, page 7. Such receipts may not be issued **after the first day of February**. Section 212 also provides tax collector shall file a list of those who have paid "on or before February 1st." This is clear authority for the tax collector to receive and issue poll tax receipts on February 1st.

You have asked several questions under your second inquiry. Your first inquiry being whether a poll tax receipt is valid and a holder thereof entitled to have his name placed on the poll list when a bank check given by the poll taxpayer is not honored by the bank upon which it is drawn. My answer to this inquiry is in the negative. **Brown v. Leek**, 221 Ala. 319, 128 So. 608:

"Particularly is it necessary to pay money in order to discharge the obligation to pay taxes, and the collecting officer is not authorized to accept any other manner of payment. **Burke v. Armstrong**, 52 Ala. 48 **City of Enterprise v. Rawls**, 204 Ala. 528, 86 So. 374, 11 A.L.R. 1175." Per Foster, J., in **Wadsworth v. State**, 225 Ala. 118, 142 So. 529.

Under these authorities a check is not payment until it is collected from the bank. Under Section 212 above referred to, the poll list must be a list of those who have on or before February 1st **paid** the poll tax. Unless, therefore, the payment is received on or before February 1st, it is not a valid payment and the taxpayers should not be included on the list of those who have paid the poll tax.

Your last inquiry is as to the liability of the tax collector who takes a check in payment of poll tax, issues a tax receipt therefor, and who fails to collect on the check by diligent effort. In my opinion, the Tax Collector is not liable therefor.

Of course, the taxpayer has procured a receipt which purports to show that he has complied with the requirement that he pay his poll tax, but inasmuch as the check which he tendered in payment of such poll tax was uncollectible, he has in fact procured nothing. The Tax Collector ought, in such instances, to make a diligent effort to recover the poll tax receipt from the taxpayer; but whether he is able to recover the receipt or not, he should strike the taxpayer's name from the list of those persons who have paid poll tax in due time, and give notice to the Probate Judge that the name of the taxpayer whose check is uncollectible should not be added to the list in the hands of the Probate Judge.

Of course, Section 207 requires that the Tax Collector account for unused receipts and return the stubs thereof. In the event the collector is unable to recover the poll tax receipt from the person who gave an uncollectible check therefor, he should account for the loss of the receipt by an explanation of the circumstances under which he parted with it.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Birmingham, Alabama.

Costs—County, City and School Districts should not pay their pro rata share of trial tax and library tax in tax appeal suits where costs were taxed against the State.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 26, 1937, which is as follows:

"In prorating the costs, which have been taxed against the State of Alabama in these tax cases, we figured the proration which did not include the \$3.00 trial tax and the \$1.00 library tax. After thinking the matter over, it seems to me that probably the County, the City and the Schools should pay their pro rata share of this \$3.00 tax and \$1.00 tax, and in that case I would probably have to submit additional bills to them."

It is ascertained from other correspondence that the cases in question are tax appeal cases where the costs were taxed against the State.

In answer to your inquiry, it is my opinion that the County, City and School Districts should not pay their pro rata share of the trial tax or the library tax in such cases.

The State is not liable for trial tax.—**Opinion of Attorney General to State Comptroller on May 23, 1935.** Neither is the State liable for the library tax imposed by Acts 1927, p. 261.—**Quarterly Report of Attorney General, Vol. II, p. 47.** Therefore, the two taxes in question are not taxable as part of the cost in the cases under consideration.

The proration provision of costs in tax cases, which you evidently have in mind, is Section 382 of the Revenue Act of 1935, (Acts 1935, p. 569) which is as follows:

"Section 382. Any court costs taxed against the State, shall be paid by the State, and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. The sworn certificate of the Clerk or Register approved by the State Comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, and shall be treated as a preferred claim."

The proration of the costs under the above quoted provision, in my opinion is applicable to only the costs actually taxed against the State, which would not include the trial tax and library tax in the cases under consideration. Therefore, these two taxes should be disregarded in prorating the costs in accordance with Section 382, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. Frank M. Johnson,
Judge of Probate,
Winston County,
Double Springs, Alabama.

Budget Act — Compensation for keeping of records provided for in said Act must be paid from General Fund of County and may not be paid from Gasoline Tax Funds.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 16, 1937, in which you request my opinion as follows:

"Under Section 8½ of the County Financial Control Act, approved September 9, 1935 a provision is made for the payment of reasonable compensation for the keeping of the records as specified in said Act.

"I would like to have an opinion from you as to just what funds can the keeping of these records be paid. Can the same be paid from the Gasoline Tax Fund?"

In my opinion the provision for reasonable compensation set forth in section 8½ of the County Financial Control Act, approved September 9, 1935, authorizes the payment of such compensation for the keeping of the records as specified in said Act from the General Funds of the County. There is no authority in the Act to pay such compensation from the Gasoline Tax Fund. Your attention is directed to opinions of this office in which it is held that the County Financial Control Act does not apply to the Gasoline Tax Fund under its budgeting provisions. (Opinion of the Attorney Gen-

eral, Quarterly Report, Vol. V, pages 32 and 38). You will note that in the opinion to Hon. G. H. Howard, Probate Judge, Elmore County, it was held "from the above provision and from other sections of the Act, it seems clear that the intent of the Legislature was that the Act should apply only to the General Fund as far as its budget provisions are concerned." (Quarterly Report of the Attorney General, Vol. V, pages 38, 39).

It therefore follows quite logically that since the Act does not include the Gasoline Fund under budgeting provisions no payment may be made from the Gasoline Fund to cover the expenses of the operation or of the enforcement of the Act.

Your attention is also directed to the fact that by an Act approved March 4, 1937, (General Acts, Special Session, 1936-37, page 179) the Legislature enacted a law to prevent the use of the revenue derived from the taxes on gasoline, etc., for any purposes other than for the construction, improvement, and maintenance and supervision of highways, bridges, and streets, etc. It cannot be contended that the compensation for keeping the records provided for in Section 8½ of the Budget Act is such an expenditure as is mentioned in the Act found on page 179 of said 1936-37, General Acts.

Your attention is further called to the case of **Weaver v. Tidwell**, 153 So. 218, wherein Chief Justice Anderson speaking for the Supreme Court held that where an Act stated that a certain expense was "to be paid out of the County Treasury" this meant out of the General Funds of the County. This case is quite analogous to the case at hand, and I commend it to you for your attention.

Premises considered it is my opinion that the compensation provided for keeping the record mentioned in Section 8½ of the Budget Act must be paid from the General Fund of the County and the Gasoline Fund may not be expended for this purpose. Nothing said supra, however, must be interpreted to mean that the Probate Judge is entitled to said compensation. (See opinion of Attorney General to Hon. Chas. W. Lee, State Comptroller, under date of May 8, 1937).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Counties required to pay for printing of homestead tax exemption forms.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of June 21, 1937, in which you request my opinion as follows:

"The tax collectors and the tax assessors of Barbour County are calling upon us as Attorneys for the Board of Revenue of Barbour County to advise them relative to the ordering of the necessary blanks required appertaining to the exemption to the taxpayers for the state's part of the ad valorem tax on homesteads. As we understand it, these officials have been directed to secure and have on hand the necessary forms prescribed by the State Officials in connection with having the claim made by the taxpayers for the homestead exemption, which appeared to have been assessed by the assessor, and for which said State's part of the tax the homestead owners have been relieved of by the recent decision of the Supreme Court of Alabama. Inasmuch as the examiner of public accounts in taking up county officers and especially the Board of Revenue, has been very critical as to all charges, we are requesting of your office an opinion as to whether or not the payment for the necessary forms required by officials in connection with the relief for the assessment for the homestead concession, is a County matter or a State matter. As we understand it, it is purely an exemption for the State's part of the ad valorem tax, and it would appear to us that the State would be liable for this expense in printing these forms.

"In view of the opinion of the Supreme Court in the case of State vs. Tuscaloosa County et al recently decided, wherein the Court holds that the State is responsible for the expense accrued in auditing the accounts of County Superintendents of Education, et al as between County and State, holds that additional moneys are State's funds, it occurs to us that the State would be liable for the expense of preparing these necessary forms.

"Be that as it may, we always are happy to have an opinion of your office relative to such matters and we would be very glad indeed if you would render us an opinion as County Attorneys as to whether these forms, now required necessary, are to be paid by the State of Alabama or the County of Barbour."

I am of the opinion that the homestead assessment forms to which you refer should be paid for by the County. Section 27 of the 1935 Revenue Act (1935 Acts, page 256, at page 274) provides that it is the duty of the Assessor to have assessment blank forms printed at the expense of the County, and Section 28 of said Act provides:

"Section 28. It shall be the duty of the courts of county commissioners or boards of revenue of the several counties in this State to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with **all necessary books, stationery and printed blanks** for the proper conduct of their several offices." (Underscoring supplied).

I do not feel that the case of **State v. Tuscaloosa County** 172 So. 892, is applicable. In that case the court held that under a statute which requires a county to pay for an audit made for the county, the county could not be required to pay for the auditing of the accounts of the County Superintendent of Education and County Treasurer of School Funds because such were not examinations for the county.

I am of the opinion that the Sections of the Revenue Code above referred to, make it the duty of the county to supply the homestead tax exemption forms.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1937.

Hon. John Brandon,
State Treasurer,
Capitol.

Pensions — Act No. 172, H. B. 260, approved March 1, 1937, imposed upon County Departments of Public Welfare the duty heretofore imposed upon the Probate Judge under Section 2969 Code of Alabama of 1923 relative to the delivery of a Confederate Pension Warrant and the proper endorsement thereon when said pensioner is deceased.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter July 9, 1937, which is as follows:

"Please advise if Section V of an Act No. 172, House Bill No. 260 passed in the last special session of the Legislature transfers the duties of the probate judges of the various counties, as provided in Section 2969 of the Code of Alabama, to the Welfare Department of the State."

In answer to your inquiry, I am of the opinion that the duties imposed upon the Probate Judges under Section 2969, Code of 1923, were transferred to the County Department of Public Welfare by Act No. 172, House Bill 269, approved March 1, 1937. Act No. 172 provided that the State Department of Public Welfare should perform certain duties in regard to Confederate pensions. Section 5 of said Act provides as follows:

"Section 5. It is not the purpose or intent of this Act to deprive the Probate Judge of any duties now imposed upon him by law in connection with Confederate Pensioners other than to relieve him of the duty of receiving and delivering the pension warrants issued by the State Department of Public Welfare. All of the duties heretofore vested in the Probate Judge in connection with the receipt and delivery of pension warrants, are, however, imposed by this Act upon the County Department of Public Welfare."

From the above it appears that the duties of the Probate Judge in regard to receiving and delivering pension warrants were transferred to the County Department of Public Welfare. This was the only duty in respect to Confederate Pension Warrants which was taken away from the Probate Judges.

The inquiry presents itself as to whether or not the duties required of Probate Judges under Section 2969, Code of 1923 is such a receiving or delivering of pension warrants as has been taken away from the Probate Judges and transferred to the Departments of Public Welfare. In my judgment this inquiry should be answered in the affirmative. Section 2969, Code of 1923, provides as follows:

"2969. On death of pensioner delivery of next quarterly payment.— Should a pensioner die leaving a widow who would be entitled to a pension under the provisions of this article, or if there be no widow, leaving a minor child or children, or should a widow die leaving a minor child or children, the probate judge shall deliver the warrant of the next quarterly issue, succeeding the death of said pensioner, to the widow, or if there be no widow, to the minor child or children, of such pensioner, and should there be no widow or minor child of such deceased pensioner, the probate judge shall endorse such fact on the pension warrant and collect the same and apply the proceeds, first to the payment of the burial expenses, and second, to the expenses of the last illness of the pensioner, attaching thereto a receipt or statement of payment of such expenses."

The duties heretofore required under this section of the Probate Judges are incident to the receiving and delivering of the pension warrants. The making of the endorsement when the pensioner is dead, is incident to the duty of receiving and disbursing said warrants. This duty now should be performed by the County Departments of Public Welfare under the provisions of Section 5 of Act No. 172, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 19, 1937.

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Section 269 of School Code of 1927 — Expenses of three mill tax election — Officers entitled to same pay as entitled under general election laws.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 3, 1937, in which you request my opinion as follows:

"A 'three mill tax' election for the Eufaula School District was recently held in Barbour County in all respects as provided by Sections 261-292 inclusive of the School Code of 1927.

"The election of course carried, and the Board of Revenue of Barbour County by the authority of Section 269 of the School Code of 1927, paid the expenses incurred as provided for under the general election law.

"An examiner of accounts recently checked up the Board of Revenue, and charged back a part of the payment, and as we understand his criticism to it was by an Attorney General's Opinion of 1918-1920, page 196. We are of the opinion that Section 269 of the School Code of 1927 governs. Please advise."

Section 269 of the School Code of 1927 provides as follows:

"The officers, including the sheriff, shall perform the same duties, and receive the same pay as provided for under the general election laws aforesaid and all costs and fees of said election shall be paid out of the county treasury."

This section is express authority for the Board of Revenue to pay the costs and fees provided under the general election law.

You do not advise in your letter what fees or costs which were paid by the Board of Revenue were charged back by the Examiner of Accounts. The opinion in Biennial Report of Attorney General 1918-1920, page 196 holds that there is no statutory authority for fees by the sheriff for serving notices upon inspectors of elections under Code Section 348. This holding is not changed by Section 269 of the School Code, since such Section only authorizes the County Board to pay such fees and charges as are authorized by the general election law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Statutes—Act No. 252, General Acts, 1923, p. 259, is constitutional.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 9, 1937 which is as follows:

"At page 259 of the General Acts of 1923 is an Act of the Legislature approved September 24, 1923.

"Does this Act violate Section 108 or any other Section of the Constitution of Alabama?"

In my opinion, Act No. 252, General Acts, 1923, p. 259, is constitutional. It is as follows:

"Section 1. That hereafter should any costs be collected either by the clerk or sheriff, and there is not enough cost collected to pay the clerk and sheriff in full, the same must be prorated in proportion to the amount due each .

"Section 2. That any clerk of the Circuit, County or other court of like jurisdiction, or sheriff, who violates the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten nor more than one hundred dollars.

"Section 3. That laws in conflict with Section one of this Act are hereby repealed.

"Approved September 24, 1923."

Section 108 of the Constitution of Alabama, 1901, to which you refer, is as follows:

"The operation of a general law shall not be suspended for the benefit of any individual, private corporation, or association, nor shall any individual, private corporation or association be exempted from the operation of any general law except as in this article otherwise provided."

In my opinion Act No. 256 does not come within the provisions of Section 108 of the Constitution for it does not attempt to suspend a general law for the benefit of an individual or class of individuals.

At common law costs were not recoverable. Therefore, costs can be imposed and recovered only in cases where there is statutory authority therefor—**Ex Parte Cudd**, 195 Ala. 80, So. 721; **Victor Adding Machine Co. v. Long**, 20 Ala. App. 633, 104 So. 679. The entire matter of costs and fees is subject to legislative enactment, and I know of no Constitutional inhibition against a general law which makes the fees of the clerk and sheriff preferred claims in any case where the entire cost is not collected.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. Eugene B. Henry,
Commissioner of Licenses,
117 Court House, Jefferson County,
Birmingham, Alabama.

Licenses — Schedule 117 of the 1935 Revenue Act levying a license on radio dealers, held valid.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 15, 1937, in which you request an opinion as to the validity of Schedule 117 of the 1935 Revenue Act, which levies a license on radio dealers. Schedule 117 of this Act reads as follows:

"Schedule 117. Every person engaged in the business of selling radios or other receiving or transmitting machines, shall pay the following annual privilege tax: In cities of over fifty thousand (50,000) inhabitants, Twenty-five Dollars; in cities of over fifteen thousand (15,000) inhabitants and not exceeding fifty thousand (50,000) inhabitants, Fifteen Dollars, (\$15.00); in cities and towns of over five thousand (5,000) inhabitants and not exceeding ten thousand (10,000) inhabitants, Ten Dollars (\$10.00); in cities or towns of over one thousand (1,000) inhabitants and not exceeding five thousand (5,000) inhabitants, Five Dollars (\$5.00); in all other places, whether incorporated or not, Three Dollars (\$3.00)."

You will note that this schedule omits any specific mention of dealers in cities or towns with a population ranging from ten to fifteen thousand. However, the last clause in the schedule levies a license of \$3.00 on dealers "in all other places whether incorporated or not."

While the constitution requires equal protection of the laws and uniformity of taxation, it is not violated by the classification of a business on a reasonable basis. 37 C. J. 204; 17 R. C. L. 513. Our Supreme Court has stated:

"Perfect equality is unobtainable and the only limitation on licenses seems to be that it must not be so unreasonable as to show a purpose to prohibit a business which is not in itself injurious to public health or morals. 1 Cooley on Taxation, 3rd Edition, p. 258, et seq.; 2 Cooley on Taxation 3rd Edition, page 1133, et seq."

"While there must be a proper classification, yet that very classification suggests that it is proper to make a distinction between persons engaged in the same business according to the amount of business done and in thus classifying a large discretion must be left to the legislative department. Unless it is unreasonable, arbitrary or oppressive, it will not be interfered with by the Court. *Mayor and Aldermen of Birmingham v. Goldstein*, 151 Ala. 473-477."

It is now definitely decided in Alabama that classification according to the population of different localities is reasonable and constitutional. *Tucker v. State*, 213 Ala. 421, 105 So. 190.

Since the legislature has the authority to make such classification according to population, our remaining question is whether the fact that dealers in cities of from ten to fifteen thousand population, pay a \$3.00 license, while those in towns from five to ten thousand pay \$10.00, makes the license schedule unreasonable and arbitrary. All doubt should be resolved in favor of the constitutionality of the act and all presumptions indulged in favor of the reasonableness of classification made by the legislature. **Wages v. State, 141 So. 707; State v. Gullatt, 210 Ala. 452, 98 So. 372.** Allowing such presumptions in favor of the constitutionality, I am not able to hold that the classification is unreasonable and arbitrary.

In my opinion, therefore, the schedule is valid.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 21, 1937.

Hon. R. J. Goode,
Commissioner of Agriculture & Industries,
Montgomery, Alabama.

1. Municipalities and counties liable for inspection fees under Section 9, Article 20, Agricultural Code, as amended by Acts 1935, page 45.

2. Such inspection fees may be collected by foreclosing the lien under said section or by civil action therefor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 17th, in which you request my opinion as follows:

Your opinion is respectfully requested as to the following:

"1. Is gasoline and other liquid motor fuels subject to the inspection fee when such products are sold to a municipality or county and if so, are municipalities and counties liable for said fees when the company sells said products outside the state of Alabama to a municipality or county and the product is in turn imported into Alabama by said city or county for its use, under Section 9, Article 20, Agricultural Code as amended by Act of the legislature, approved February 5, 1935, being H. 59?

2. Under the same section, in case municipalities and counties are liable for said fees, would, in your opinion, the most effective and practical method of enforcement be that of asserting a lien upon products

upon which said fees have not been paid in the same manner as provided in the case of taxes upon personal property?

"For your information, we beg to state that a few of the cities and counties have denied their liability for these fees upon the ground that the law applies only to 'person, firm or corporation' and does not include cities and counties or that cities and counties not being expressly named are exempt under the rule as to taxation which is stated in 2 Cooley on Taxation, Sec. 621 as follows:

" 'All such property (referring to property of the state and its subdivisions) is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself, and no one would be benefitted but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the constitution or a statute.'

"We have been cited the following cases: **State v. City of Montgomery**, 151 So. 856, and **City of Birmingham v. State**, 170 So. 64. These cases referred to taxation, in which the above stated rule would be applicable.

"It is our belief and contention that said cases with reference to the rule as stated by Mr. Cooley would not apply to inspection fees charged for a service rendered under the police powers of the state and for the purpose of paying the expenses of police regulation. The reason for the existence of the rule as to taxation does not exist in the case of inspection fees for regulation purposes. It is as important for the protection of cities and counties and their people who contribute the taxes for the support of said cities and counties that inferior products used by them be regulated and inspected as it is for the individual consumer of such products.

"Inspection fees are not taxes and would not come within the rule of implied exemptions applicable only to taxation based upon the reason that only those employed would be benefitted and going to increase a useless levy. 32 C. J. 935 and cases cited under note 3.

" 'The word "person", like many other words, has no fixed and rigid signification, but has different meanings dependent upon contemporary conditions, the connection in which it is used, and the result to be accomplished'. **Commonwealth v. Welosky**, 177 NE. 656 (Mass). 'Person, firm or corporation' is broad enough to include municipal corporation and whether or not so included 'must be determined by a consideration of the subject matter of the statute, its purpose and effect.' **City of Jackson v. State**. 126 So. 2, 156 Miss. 306; **Peoples v. Deep Rock Oil Corp.** 175 NE. 572, 343, Ill. 388. In many cases, other than taxation statutes, municipalities and counties have been included within the general wording and statute whenever a reasonable construction of the statute, con-

sidering its subject matter, purpose and effect, or the intent of the legislature, make it the reasonable intent.

"It appears from a consideration of the statute under consideration that the legislative intent and the purpose to be accomplished was to prevent the sale of motor fuels in Alabama except those in compliance with the standards adopted or to be adopted and further to prevent the importation into the state any other motor fuels than standard products. See Secs. 2, 4, 5, 10 and 15 of the Act. In no instance does the act contemplate or allow the dealing in within the state or the importation into the state of motor fuels other than standard products subject to inspection. In fact the prevention of the importation of under-standard motor fuels was paramount to the enforcement of the regulation of the quality of the products in the state.

"This is further shown by the fact that the principal change made in the old law, Agricultural Code of 1927, p. 81, by the amendment was the addition of the regulations as applicable to importations of motor fuels into Alabama. **Long v. Poulos**, 174 So. 230.

"Further, Section 9 of the Act places the duty of payment first upon the seller for importation into the state or seller within the state, if the latter be the first seller of the product. The fee follows the product if unpaid by the first seller and it becomes the duty of the successor in title to pay said unpaid fees. If the city purchased motor fuel from a dealer within the state or from a refiner or dealer outside the state who had complied with the Act and paid the inspection fees, the city or such dealer, refiner or outside dealer, would not be entitled to have the fees abated to the extent of such sale to the city. **State v. City of Montgomery**, supra; **Orange State Oil Co. v. Amos**, 100 Fla. 884, 130 So. 707. The fees are exacted first of the dealer or refiner selling the products in Alabama or for importation into Alabama. If such fees are not paid by the one first having the duty to pay, the fees are to follow the product and it becomes the duty of the one receiving the same to make such payment or to have the lien asserted upon the product for the payment of the fees.

"Section 10 further confirms this view in that it provides that the Commissioner be advised of the destination of products sold in or for importation into Alabama, in order that he may inspect the same and determine whether or not fees have been paid and if not paid enforce collection.

"Section 17 of the Act expressly provides for exceptions to the Act. Products sold to cities and counties are not included therein. The statute, not being for the levy of a tax on property, nor excise tax, would be subject to the maxim, 'Epressio unius est exclusio alterius,' rather than to the rule of implied exemptions applied to taxation statutes, in its interpretation. Being an inspection or regulatory act rather than a taxation act, the rigid rule as to exceptions instead of the liberal rule of implied exemptions would seem to apply.

"Therefore, it is our conclusion, upon which your opinion is respectfully sought, that it is the intention of the Act to prevent the sale of motor fuels of understand quality in the state or for importation into the state regardless of who may be the receiver or consumer and to

assess the expenses against those to be benefitted. Further, sales of such products within the state to cities and counties are subject to inspection and the fees against the cities and counties if unpaid by the seller to them, and, if the city or county purchases outside the state for importation into the state and the fees are unpaid by the seller to it, the right to inspect and the fees therefor are not lost by the city or county becoming the receiver or user."

Article 20 of the Agricultural Code of 1927 regulated the sale of gasoline in the State of Alabama and contains certain provisions for the determination of the standard of such motor fuels.

By Act No. 27 (General Acts 1935, p. 45), this Article 20 was amended so as to regulate not only the sale but the importation into the state of such liquid motor fuel. The particular section in question is Section 9 of this amendatory act. The section was amended by including the words "for importation into the state" after the words "offered for sale" in the first sentence of such section. The section then provides:

"It shall be the duty of the person, firm or corporation first selling in or for importation into the state gasoline, benzine, naptha or other liquid motor fuels, to pay said inspection fee; provided that if such person, firm or corporation fails to pay said inspection fee the commissioner shall require the payment of said fees from such other person, firms or corporations as may receive gasoline, benzine, naptha or other liquid motor fuel upon which the inspection fee has not been paid."

This sentence was amended by the inclusion of the words "or for importation into the state."

In my opinion, this act, as amended, shows a clear legislative intent to require the payment of an inspection fee, not only for the sale of gasoline in the state, but to require the payment of the inspection fee by the person, firm or corporation selling gasoline for importation into this state, with the further requirement that if such person selling gasoline or motor fuels for importation into the state fail to pay the inspection fee, such fee must be paid by the person, firm or corporation receiving such motor fuel in the State.

Some question might arise as to the effect of this statute being a burden upon interstate commerce, since as amended it applies to gasoline purchased outside of the state and brought into the state. However, it is now settled by the Supreme Court of the United States that a state is within its governmental powers in requiring inspection of motor fuels, including tests as to quality, as a safeguard in respect to such inflammable substances, when found within the borders of the state or even when moving in commerce from state to state. **Texas Co. v. Brown**, 258 U. S. 466, L. Ed. 721.

I therefore proceed to a consideration of the direct questions asked by you. Your first inquiry is whether such motor fuels are subject to inspection fee when the products are sold to a municipality or county.

It is well settled that a state may, as an incident to its power to enact valid inspection laws, impose a reasonable fee or charge for the purpose of defraying the expenses of inspection and such fee is not a tax. **Texas Co. v. Brown**, 226 Fed. 577 **Texas Co. v. Brown**, 258 U. S. 466, 66 L. Ed. 721; **Louisiana**

State Board of Health v. Standard Oil Co., 107 La. 713, 31 So. 1015; **St. Louis v. Craftman Dairy Co.**, 190 Mo. 492, 1 L. R. A. (N. S.) 636.

The law is well settled in Alabama that while ordinarily a tax levy in general terms does not include municipal corporations, the state may levy an excise tax on gasoline stored by municipal corporations. **City of Birmingham v. State**, 170 So. 64. The reasons for requiring a clear indication of the legislative intention to tax municipal corporations is that the levying of such tax upon municipal corporations would render necessary new taxes to meet the demand of this tax therefore such intention to require the municipalities to levy a tax to pay a tax should not be imputed. Such reasoning, however, is inapplicable to an inspection fee, as distinguished from a tax.

The entire purpose of the inspection law contained in Article 20 of the Agricultural Code, as amended by the Act of 1935, *supra*, is for the protection of purchasers and other persons coming in contact or liable to be injured by adulterated or impure motor fuels. Such purposes are equally applicable to motor fuels purchased by the city, and where such fee is a reasonable inspection fee, as distinguished from a tax for the purpose of raising revenue, in my opinion the municipality is not exempt from the payment of such fees.

In the case of **People v. Denver**, 84 Col. 576, 272 Pac. 629, the court had presented to it this exact question and it was there held that the city was liable for an inspection fee for the inspection of gasoline used or offered for sale by the city, since the fee was imposed for public protection and not for revenue, and the reasons for inspection fitted the city as much as private individuals. This was the holding of the Colorado court, although the city was not liable to pay a revenue tax imposed on gasoline by another statute; while, as you know, under the decision of **City of Birmingham v. State**, *supra*, such municipalities in Alabama are also liable for revenue tax on gasoline.

Since such a municipality is not exempt from the payment of the inspection fee, in my opinion your second question should also be answered in the affirmative. This second inquiry is whether municipalities and counties are liable for said fees when they purchase the motor fuels outside the State of Alabama and import the motor fuels into the state for their use. Under the provisions of Section 9 of the amendatory act, such inspection fee should be paid by the person, firm or corporation selling such motor fuels for importation into this state, but if not paid by the person selling, it will remain a liability upon the person importing such motor fuels into the state."

Under the decisions above cited, it is my opinion that said municipalities and counties are not exempt from the payment of such reasonable inspection fees, even where the gasoline is purchased out of the state by such municipality or county and imported by it.

Your next inquiry is whether the most effective and practical method of enforcement of the liability for such fees would be that of asserting a lien upon products upon which said fees have not been paid. Said Section 9 provides:

"The inspection fees shall constitute and operate as a lien, at all times until paid, upon any gasoline, benzine, naphtha or other liquid

motor fuels sold or offered for sale in or imported into this state and shall be enforceable immediately when due, by the commissioner in the same manner as tax liens of the state upon personal property of a delinquent taxpayer are enforceable."

While this method of enforcement is not exclusive, in the ordinary case, it affords a most effective and practical method for the collection of said inspection fees. I call your attention, however, to Code Section 7889:

"All property, real or personal, belonging to the several counties or municipal corporations in this state, and used for county and municipal purposes, shall be exempt from levy and sale under any process, judgment or decree whatsoever."

Therefore, if such motor fuel is to be used for municipal purposes, it is exempt from levy and sale under such lien and other appropriate civil action for the collection of the inspection fees should be adopted.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. J. W. Sharpton,
President, Board of Revenue,
Etowah County,
Gadsden, Alabama.

1. Sheriffs of the various counties are entitled to \$5.00 for summoning jury in capital cases.
2. Where the defendant in capital case is convicted and sentenced to the penitentiary, the State under Section 3667. Code of Alabama, 1923, pays \$3.00 of this charge, the county should pay the other \$2.00 from the county treasury.
3. Such claims by the sheriff for services which he indicates here are barred by the statute of limitations of one year. (Section 228, Code of 1923).

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of June 28, 1937, in which you request my opinion as follows:

"The Sheriff of Etowah County has presented a bill to the Board of Revenue of Etowah County, Alabama for payment. A copy of this account is enclosed herewith:

"You will note that in a number of these cases in which the Sheriff claims a fee there are acquittals and mistrials etc.

"Please examine this account, copy of which I enclose, and give me your opinion on the following questions:

- "1. Should the County pay this account?
- "2. Should the County pay when the case is continued?
- "3. Should the County pay when there as an acquittal of Defendant?
- "4. Some of these cases named by the Sheriff are over two years old. Is there a statute of limitation against such claims?"

It is my opinion the Sheriff is entitled to his \$5.00 fee for summoning a jury in capital cases paid by the county under Section 3741, Code of Alabama, 1923, which section fixes the fees and allowances of the sheriffs of the State, "for summoning jury in capital case, or at any special court for the trial of criminal to be paid out of the county treasury . . . \$5.00." Now, of course, the State under Section 3667, Code of Alabama, 1923, pays \$3.00 of this where the defendant is sentenced and is received in the penitentiary, but this leaves a balance of \$2.00 that should be paid by the county out of the general fund. Now, in all cases where the defendant is acquitted or the case is abated by death or is noli prosequi, the sheriff would be entitled to \$5.00 to be paid out of the county treasury which means the general funds as the State does not pay any fees except on conviction and delivery of a prisoner to the Convict Department. The reason for saying that it is paid out of the general fund, I base this on the holding in the case of **Weaver v. Tidwell**, 153 So. 218.

In answer to your fourth inquiry, it is my opinion that claims not presented within one year are barred by Section 228 of the Code of Alabama of 1923, which is as follows:

"Claims barred if not presented—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

It is true that the amount of the fee of the sheriff in any particular case is fixed by statute "where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the County Board." Such claims need not be presented as required by statute and are not barred by this section. **State ex rel Mobile v. Board of Commissioners of Mobile County**, 180 Ala. 154. **Caldwell v. Dunkin**, 65 Ala. 461. However, this rule is applicable only where the law itself determines both the fact and the amount of the claim. In the Mobile case cited, the law required the county to pay one-half of the expense of maintaining a pesthouse, but the exact amount could only be determined by the books of the City of Mobile. It was, therefore, held that appropriate claim should have been presented by the City of Mobile and that in the absence of such presentation within the proper time, the claim was barred. Here the law sets the amount in each case . . . \$5.00. But the number of cases and the particular case in which the sheriff is entitled to the fee are undetermined

and must be set out in an appropriate claim filed as required by law. In my opinion, therefore, an audit and allowance of the claim are required, and under Section 228 of the Code of Alabama, such claim is barred if not presented for allowance within twelve months after date it accrues or becomes payable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. J. W. Brock,
Clerk & Register, Circuit Court,
Coffee County,
Enterprise, Alabama.

Trial Tax—

Municipalities are liable for trial tax on all cases in which the municipality is a party litigant that go upon the Circuit Court docket, equity or law, except those cases specifically exempt by Section 9 of an Act approved July 17, 1935, (General Acts, 1935, page 256).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 28, 1937, in which you request my opinion as follows:

"Sometimes ago I wrote asking for an opinion as to City paying trial tax in City cases.

"You acknowledges receipt of my letter but, so far have not heard from you concerning same.

"Will appreciate it very much if you will let me hear from you as early as possible as they are wanting to settle some cases."

It is my opinion municipalities are liable for trial taxes in all cases in which they are interested, when costs are taxed against the municipality that go on the docket of the Circuit Court, both Law and Equity, except in such cases as are specifically exempted under Section 9 of an Act approved July 17, 1935, (General Acts, 1935, page 256). The Section I refer to is as follows:

"Section 9. A trial tax of three dollars (\$3.00) be, and the same is hereby imposed in each case civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected

to be paid by the clerk or register of such court as follows: One-half ($\frac{1}{2}$) thereof into the general fund of the State Treasury, and the other one-half ($\frac{1}{2}$) into the general funds of the county in which the same is collected and for collecting and remitting such tax, the clerk or register may retain five per cent (5%) commission thereof. In all counties in this State where the clerk or register is paid on a salary basis under constitutional authority the five per cent (5%) commission provided for by this Act shall not be collected, but such clerk or register shall pay to the State and county respectively each one-half of such trial tax. This trial tax fee shall not, however, be imposed or collected in cases made by any city, or town as a result of the filing by the clerk or other officer of such city or town with the Register of the Circuit Court or like officer of a court of the county having equity jurisdiction, of a list of delinquent taxpayers and property upon which city or town taxes are due as is now or may hereafter be required by law; nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, and cases for municipal assessments shall not be subject to such tax, and tax cases."

Although municipalities are not specifically included, it is my opinion that the exemptions set out above clearly indicate the intention of the Legislature to cover municipalities in all cases not specifically exempt. Chief Justice Marshall stated the following in **Brown vs. Maryland**, 12 Wheat. 419, and this rule was recently reiterated in **Moore Ice Cream Co. vs. Rose Collector of Int. Rev.**, 289 U. S. 73, 53 Sup. Ct. Rep. 620.

"An exception of a particular thing from the general words shows that, in the opinion of the lawgiver, the thing excepted would be within the general provision had not the exception been made."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. Ernest L. McClure,
Circuit Court Clerk,
Lauderdale County,
Florence, Alabama,

Juries — Jury Box—

1. Jury box should be refilled by Jury Board at the regular meeting of the Jury Board beginning on the first Monday in October of each year, as provided for by the Acts of 1931, page 55.

2. Circuit Judge or judge of court of like jurisdiction may in his discretion call the Jury Board together and empty and refill the jury box of the county whenever he deems it necessary or expedient.

3. Names drawn from jury box should be withheld from the box until the jury box is empty or will probably be empty at the next drawing as provided for by the provisions of the Acts of 1931, page 55, Act No. 47, as amended by the Acts of 1935, page 713, Act No. 288.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request of recent date as follows:

"Our jury commissioners have for years placed back into the jury box **once each year** the names of all qualified jurors of the County including those drawn and those who served for that particular year preceding. This has been done each year though there have been in each instance an abundance of names of qualified jurors left and remaining in the jury box at the time and immediately before the commissioners placed back into the box the names of those who had just served during the preceding twelve month period.

"Section 8604 of the 1923 Code provides and seems to indicate conclusively that the commissioners shall refill the jury box and make a new roll only . . . 'whenever the names in the jury box are exhausted, or so far depleted that they will probably be exhausted at the next drawing of jurors...'

"I have read the case of *Steele v. State*, 111 Ala. 32 and it would seem to substantiate this view.

"When the names of those serving during the year are placed back into the box each twelve month, many of them are drawn by chance year after year, and many qualified jurors are left in the box and by chance are not drawn year after year, and simply cannot understand why they are not allowed to serve when others serve year after year.

"Should the cards of those serving be kept out of the box until the names in the box are exhausted or will probably be exhausted at the next drawing."

In my opinion, the matter of refilling the jury box is governed by the provisions of the General Acts of 1931, page 55, Act No. 47, Sections 13, 14, 15, 17 and 18, as affected by the Acts of 1935, page 713, Act No. 288, which amend Section 18 of the Acts of 1931 above referred to. Sections 13, 14, 15 and 16 of the Acts of 1931, provide as follows:

"Section 13. The Jury Board shall meet in the court house at the County seat of the several counties as soon after the approval of this Act as is practicable and thereafter on the first Monday in October in each year, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the Jury Board shall cause to be written on the roll opposite every name placed thereon the occupation, residence

and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the Jury Board shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one card. These cards will be placed in a substantial metal box provided with a lock and two keys which box shall be kept in a safe or vault in the office of the probate judge and if there be none in that office, the Jury Board shall deposit it in any safe or vault in the court house to be designated on the minutes of the Board, and one of said keys thereof shall be kept by the President of the Jury Board. The other of said keys shall be kept by a judge of a court of record having juries other than the probate or circuit court and in counties having no such court then by the Judge of the circuit court for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the Jury Board exclusively. It shall not be inspected by any one except the members of the Board or by the Clerk of the Board, unless under an order of the Judge of the Circuit Court, or other court of record having jurisdiction."

"Section 14. The Jury Board shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of age or who is an habitual drunkard, or who being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or householder his name may be placed on the jury roll and in the jury box."

"Section 15. The Jury Board in each of the counties of this state shall meet as soon after the approval of this Act as is practicable and empty the jury boxes in their respective counties and from the new jury roll prepared as herein prescribed refill such jury boxes. Provided however that the provisions of this Section (15) shall not apply to those counties in the State having a population of Three Hundred Thousand (300,000) or more according to the latest Federal Census, and in which the Jury box or boxes have been filled by the jury commission within twelve (12) months preceding the approval of this bill."

"Section 16. Whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors, the Jury Board must proceed to make and certify a new roll and deposit the names in the box in all respects as provided in this Act, and for this purpose the Jury Board must meet whenever it is necessary and refill the jury box."

You will note that Section 13 above quoted requires that a complete roll of the eligible jurors of each county provided for by this Act shall be made up at a meeting of the Jury Board to be held beginning on the first Monday in October of each year. The names of all eligible jurors in the county are required to be placed on cards prepared for that purpose, and

placed in a substantial metal box which shall be deposited in a safe or vault in the courthouse, subject to the provisions of the above quoted Act.

Section 14 of the above quoted Act requires that the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment and who are over twenty one years of age and not over sixty-five years of age and who are not habitual drunkards or unfit to discharge the duties of the jurors or who cannot read English or who have never been convicted of any offense involving moral turpitude, be placed in the jury box, the one exception to this provision is that if a person cannot read English and has all the other qualifications required he may be placed on the jury roll and in the jury box.

Section 16 quoted above requires that "whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors the Jury Board must proceed to make and certify a new roll and deposit the names in the box in all respects as provided in this Act, and for this purpose the Jury Board must meet whenever it is necessary and refill the jury box." However, the provisions of this Act have been amended by the Acts of 1935, page 713, as follows:

"Section 1. That Section 18 of an Act entitled 'An Act to establish Jury Boards in the several counties of this state, to fix the membership of said Boards, to prescribe the qualifications and terms of office and provide for the appointment of the members thereof; to fix their compensation and to define their duties; to provide for the appointment, duties and compensation of clerks of said Boards, for the qualifications of jurors, for the preparation of jury rolls and the emptying, filling and refilling of jury boxes; and to provide for the payment of the necessary expenses of the Board. (Approved Feb. 20, 1931)', be and the same is hereby amended to read as follows: Sec. 18. Whenever it shall appear to the Judge of the Circuit Court, or court of like jurisdiction, that the jury box is so nearly exhausted as to require refilling, he shall notify the President of the Jury Board, who in turn shall call together the other members of the Board and shall proceed to refill the box as herein provided; provided, however, the Judge of the Circuit Court, or court of like jurisdiction, may, whenever in his discretion he deems it necessary or expedient, call the jury board together and empty and refill the jury box of the particular county, as herein provided.

"Section 2. That all laws or parts of laws in conflict with the provisions of this Act be and the same are hereby repealed."

Section 13 of the Acts of 1931 quoted above has the effect in my opinion of requiring that the name of every male citizen possessing qualifications described by the Act to serve as a juror and not exempt by law from jury duty be placed on the jury roll and in the jury box each year.

The premises considered it is my opinion that the matter of refilling the jury box is a matter which addresses itself first of all to the Jury Board who are required, as above pointed out, to refill the jury box each year at the meeting of the Jury Board beginning on the first Monday in October. Secondly, the jury box may be refilled at any time that, in the discretion of the Judge of the Circuit Court or court of like jurisdiction, it may be deemed

necessary and expedient. The Judge of the Circuit Court or court of like jurisdiction has the right in his discretion to call the Jury Board together and empty and refill the jury box of the particular county at any time he may deem it necessary or expedient in the reasonable exercise of his discretion. It will be further noted that the Judge of the Circuit Court or court of like jurisdiction is authorized to notify the President of the Jury Board who, in turn, is required to call together the other members of the Board and proceed to refill the box as provided for by the above quoted Acts of 1935, Section 1.

You inquire specifically whether or not the cards of those serving as jurors should be kept out of the box until the names in the box are exhausted or will probably be exhausted at the next drawing. In my judgment, the cards of those serving as jurors should be kept out of the box until the names in the box are exhausted or will probably be exhausted at the next drawing. In my opinion, Section 18 of the Acts of 1931, as amended by the Acts of 1935, both quoted, *supra*, contemplates that the names of the jurors as drawn shall be kept out of the box until the box is empty or in the discretion of the judge will probably be empty at the next drawing. I call your attention to the provision "whenever it shall appear to the Judge of the Circuit Court or court of like jurisdiction that the jury box is so nearly exhausted as to require refilling * * *". In my judgment, if the cards are replaced into the jury box after each drawing there would perhaps never be a time when the jury box would be so nearly exhausted as to require refilling. It is my opinion that the intention of the Legislature here is that the names of all eligible persons for jury duty in the county should be placed in the jury box and if drawn kept out of the jury box until the box is so nearly exhausted as to require refilling, according to the provisions of the above quoted Acts of 1931 and 1935.

The refilling of the jury box was, before the passage of this law, a matter that addressed itself to the discretion and judgment of the jury commission I wish to refer you to the case of *Nelson v. State*, 62 So. 189.

You refer in your request to the case of *Steele v. State*, 111 Ala. 32, and state that in your opinion this case holds that the box cannot be refilled until the same is exhausted, or so far depleted it will probably be exhausted of the next drawing of the jurors. This case in my opinion is clearly not in point at the present time in view of the amended law pointed out *supra*.

Section 8604 of the Code of 1923 was repealed by the Acts of 1931, *supra*. I refer you to Section 25, the acts of 1931, page 55, Act No. 47, which provides as follows:

"That all laws, general, local or special in conflict with any of the provisions of this Act be and the same are hereby repealed, it being the intent of the Legislature that the subjects covered by this Act be the exclusive law on such subjects."

Premises considered, it is my judgment and opinion that the Act of 1931, quoted *supra*, as amended by the Acts of 1935, quoted *supra*, governs the refilling of jury boxes and the action of jury boards at the present time.

It is further my opinion that jury boxes may be refilled whenever in the discretion and opinion of the Judge of the Circuit Court or court of

like jurisdiction, that such action is necessary, in accordance with the provisions of law set out heretofore in this opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. H. A. Terry,
Judge of Probate,
Hale County,
Greensbore, Alabama.

1. Premiums on liability insurance on county highway trucks cannot be paid out of gasoline funds.
2. Expenses of repair shop operated by highway construction and maintenance department payable out of gasoline funds.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of March 23, 1937, in which you request my opinion as follows:

"Hale County Highway Department operates a fleet of trucks and carry a blanket liability and personal property damage insurance on this fleet of trucks. These trucks are used exclusively for road, bridge construction and highway maintenance and I would like for you to advise me if this blanket insurance premiums can be paid out of the Gasoline Funds.

"The highway construction and maintenance department also have a shop operated exclusively for the above subject. Kindly advise if the water bill, light bill and other necessary items of expense to the keeping of this shop could be paid from the Gasoline Funds."

In answer to your first question, I am of the opinion that the blanket insurance premiums cannot be paid out of the Gasoline Funds. Under the provisions of Schedule 156.9 of the Revenue Act of 1935, gasoline funds shall be expended "exclusively in the construction, maintenance and repair of the public roads and bridges in such county." The liability insurance which is authorized by Code Section 6755 (24) 1936 Supplement to Michie's Code, is for the protection of the general fund of the county. While the trucks are used in the construction and maintenance of the roads, the insurance is for the benefit of the general fund of the county and the premiums thereon in my opinion must be paid out of the general fund of the county. See *Weaver v. Tidwell*, 153 So. 218.

Your second question should be answered in the affirmative. The shops referred to and the expenses of operating such shops are part of the expenses of maintenance and repair of the public roads. .

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 23, 1937.

Hon. Chas. W. Lee,
State Comptroller,
C A P I T O L .

Elections—

1. Probate Judge held entitled to 2½c per name for making list of registered electors of county, a copy of which must be furnished to the Secretary of State, annually, required by Section 187 of the Constitution of Alabama of 1901 and Section 401 of the Code of Alabama, 1923, as provided by Section 7285 of the Code of Alabama, 1923.

2. Probate Judge held permitted to employ clerical assistance to make list of qualified electors which he is required to furnish to election officials for each election legally held in Alabama.

(a) Compensation of "up to five cents per name" for such clerical assistance held authorized, but payment of compensation must be to the clerical assistants and not to the probate judge. Section 402, Code of Alabama, 1923, as amended.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter in which you request my opinion as follows:

"1. Are Probate Judges entitled to 2½c per name for making lists of qualified voters every year or every other year?

"2. For what list of qualified voters may clerical assistants be paid five cents per name? Is it the same list for which the Probate Judge is paid 2½c per name, if not what lists or for what elections may these lists be paid for?

"You are referred to the following:

"Sec. 187 of the Constitution. Section 387, 402, and 7285 of the 1923 Code as amended by Acts of 1927, page 277 and Acts of 1931 page 293. A G. O. April 1, June 30, 1936, page 109."

In reply, I wish to advise you that, in my opinion, a Judge of Probate is entitled to 2½c per name for making an alphabetical list of the registered electors of the county, a copy of which must be furnished to the Secretary of State, annually, required by Section 187 of the Constitution of Alabama, 1901, and Section 401 of the Code of Alabama, 1923 as provided by Section 7285 of the Code of Alabama, 1923.

Section 187 of the Constitution reads as follows:

"The board of registrars in each county shall, on or before the first day of February, nineteen hundred and three, or as soon thereafter as practicable, file in the office of the judge of probate in their county, a complete list sworn to by them of all persons registered in their county, showing the age of such persons so registered, with the precinct or ward in which each of such persons resides set opposite the name of such persons, and shall also file a like list in the office of the secretary of state. The judge of probate shall, on or before the first day of March, nineteen hundred and three, or as soon thereafter as practicable, cause to be made from such list in duplicate, in the books furnished by the secretary of state, an alphabetical list by precincts of the persons shown by the list of the registrars to have registered in the county, and shall file one of such alphabetical lists in the office of the secretary of state; for which services by the judges of probate compensation shall be provided by the legislature. The judges of probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as records in the office of the judge of probate of the county. Unless he shall become disqualified under the provisions of this article, any one who shall register prior to the first day of January, nineteen hundred and three, shall remain an elector during life, and shall not be required to register again unless he changes his residence, in which event he may register again on production of his certificate. The certificate of the registrars or of the judge of probate or of the secretary of state shall be sufficient evidence to establish the fact of such life registration. Such certificate shall be issued free of charge to the elector, and the legislature shall provide by law for the renewal of such certificate when lost, mutilated or destroyed."

Section 401 of the Code of Alabama, 1923, provides:

"Section 401. List of names registered by precinct.—The board of registrars shall each year within two weeks after the expiration of the time prescribed for registration, make a copy of the list of names registered, stating the residence, color and sex of the persons registered by precinct, if not in an incorporated city or town, or by ward if in an incorporated city or town, which copy, along with the registration list, must be returned to the office of the judge of probate of the county. The judge of probate shall certify an alphabetical list to the secretary of state. The judge of probate shall keep both the original list filed by the registrars and the alphabetical list made therefrom as recorded in the office of the judge of probate of the county, which shall be open to public inspection."

Section 7285 of the Code of 1923, provides in pertinent part as follows:

"For preparing list of registered voters, as required by Section 187 of the Constitution, 2½c a copy for each voter enrolled to be paid by the county commissioners in each county."

It can be readily seen from a reading of the above quoted provisions of law that this list is a list of the registered electors of the county and not a list of the **qualified** electors thereof. The two are entirely separate and distinct. A person on the list of registered electors must have paid all poll tax required by law, unless he is exempt from the payment of the same, before his name can appear on the list of qualified electors, and it is a matter of common knowledge that many persons are registered electors without being **qualified** electors, for the reason that they have not paid all poll tax due by them.

It is this list of registered electors, a copy of which the probate judge must furnish to the Secretary of State, annually, for which he is entitled to 2½c per name for making, and not the list of qualified electors, a copy of which he is required to furnish the election officials in each election legally held in Alabama.

It is the list of **qualified** electors which the probate judge is required to make annually by Section 387, Code of Alabama, 1923, a copy of which he is required to furnish to the election officials in each election legally held, by Section 387 and 388 of the Code of Alabama, 1923, in the making of which he is permitted to employ clerical assistance as provided by Section 402 of the Code of Alabama, 1923, as amended by the Acts of 1927, General Acts, 1927, at page 277, as further amended by the Acts of 1931, General Acts of 1931, at page 293. This code section provides for the payment of compensation of "up to five cents per name" for the clerical assistance employed by the probate judge to assist in the making of this list of qualified electors. The compensation for this assistance must be paid to the clerical assistants themselves and not to the probate judge.

The holding of this office, as announced in numerous previous opinions, is to the effect that payment may be made for clerical assistance in the preparation and furnishing of the list of **qualified** electors each time an election is legally held in Alabama, whether such election be a general, special or a primary election. Of course, you are familiar with the opinion of this office holding that the Judge of Probate may not employ assistance in making and furnishing the list for a second primary when such list has been furnished for the original primary election, since the second primary election is, by the reasoning in said opinion, held to be a part of the original primary election. See Opinion of Attorney General to Hon. I. I. Moses, Russell County, under date of February 12, 1935. This opinion, and all subsequent opinions on this subject, follows the holding of this office over a period of years to the effect that this list must be prepared and furnished to election inspectors in all elections legally held, and that the judge of probate may employ and pay for clerical assistance in making said list, as provided by Section 402 as amended, *supra*, each time he is required to furnish it. The law requires that these lists be prepared and furnished the election inspectors immediately preceding each election. See opinion of the Attorney General—

Biennial Report, 1922-24, p. 461.

Biennial Report, 1926-1928, pp. 276, 146, 147, 171.

Biennial Report, 1928-1930, p. 642.

You will note that the construction here announced has been placed upon this law by those charged with the duty of interpreting and administering it over a long period of time. Our Supreme Court has held in a num-

ber of decisions that when a certain construction has been placed upon a law by those charged with the duty of interpreting and executing the law, such interpretation will not, as a rule, be disturbed and is controlling.

In the case of **State v. Board of School Commissioners of Mobile County**, 183 Ala. 554, 575, Mr. Justice Mayfield sifts this question thoroughly and carefully and states the point in the following clear, direct and forceful language:

"In all cases of ambiguity the contemporaneous construction not only of the courts but of the departments and even of the officials whose duty it is to carry the law into effect is universally held to be controlling."

See also **State v. Tuscaloosa Building & Loan Association**, 230 Ala. 481, 161 So. 530; **Macon County v. Abercrombie**, 184 Ala. 283, 63 So. 985; **State Board of Administration v. Jones**, 212 Ala. 380, 102 So. 626; **Stewart v. Wilson Printing Co.**, 210 Ala. 624, 99 So. 92; **State v. H. M. Hobbie Grocery Co.**, 226 Ala. 151.

Furthermore, this law is not new but has been re-enacted from time to time with only slight changes in 1927 and 1931. The case is, therefore, made much stronger by this fact. In the case of **Barnwall v. Murrell**, 108 Ala. 366, 18 So. 831, the Court held:

"Re-enacted statutes must receive the known, settled construction which they had received when previously of force; for it must be presumed the legislature intended the adoption of that construction, or they would have varied the words, adapting them to a different intent."

The premises considered, it is my opinion that only one construction may be placed upon this law by us here — namely, the Judge of Probate is authorized to employ clerical assistance in preparing the list of **qualified** electors and furnishing the same to the election officials each time a separate election is legally held in Alabama, and that each time the clerical assistance so employed may be paid for in the manner provided by Section 402, as amended, *supra*.

As can be seen from the above, the list of **registered** electors which the probate judge is required to make annually, a copy of which he must furnish to the Secretary of State, by Section 401, *supra*, is the list for which he is entitled to compensation at the rate of 2½¢ per name. Likewise, it can be seen that this is an entirely different list from the list of **qualified** electors which the probate judge is required to make annually by Section 387, *supra*, a copy of which he is required to furnish to the election officials, by Sections 387 and 388, each time an election is legally held in Alabama. It is the list of qualified electors that he is authorized by Section 402, *supra*, to employ clerical assistance in making, the compensation for such assistance to be paid in the manner, amount, and at the times hereinabove set forth.

These two lists have previously been confused by this office, and, consequently, some of the opinions concerning the same have been partially laid in error. The opinion to Hon. J. A. Carnley, Probate Judge, Coffee County, Elba, Alabama, under date of May 8, 1936, Quarterly Report of the Attorney General, Volume III, page 109, is hereby modified to conform to

the holdings of this opinion. Any and all other opinions of this office not in accord with views hereinabove expressed are hereby modified to conform hereto.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 27, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Alabama Luxury (Sales) Tax Act—

Counties held authorized, and under duty, to reimburse their general fund from the proceeds of the tax levied by said Act for the actual amount expended by them from the general fund for the operation of public health, public welfare, and agricultural extension service agencies or units in their counties since March 1, 1937, at which time the proceeds of the tax levied by the Luxury (Sales) Tax Act began to accrue, when the revenue available in the general fund was not sufficient to pay the involuntary obligations against said fund (that is, obligations of the county, the payment of which out of the general fund is made mandatory by statute) and also for the operation of the above named agencies or units, and the money so advanced from the general fund since March 1, 1937 was expended for this purpose by the county governing body only to keep from paralyzing the operation of these three agencies or units, and with the expectation that the general fund would be reimbursed for this amount when the proceeds of the tax levied by the Luxury (Sales) Tax Act allocated to them were received.

Opinion by the Attorney General.

Dear Sir:

I have your letter of July 23, 1937, which follows:

"The Luxury Tax Law, which became effective March 1, 1937, provides that one-fourth of the net proceeds of same shall be paid to the Counties to be used exclusively for Health, Welfare, and Extension Service.

"This Revenue began to accrue to the Counties on March 1, 1937, but the first distribution to the Counties was not made until May 25, 1937.

"The Financial Control Act, Acts 1935, page 803, provides for the adoption of a budget and that Counties shall operate within the income of the General Fund.

"Some Counties could not operate the above named agencies and also operate the necessary functions of County Government on the income of the General Fund. To keep from stopping the operation of these three agencies, such Counties advanced money from the General Fund with the expectation of reimbursing such fund from the proceeds of the Luxury Tax, when same was received. As a result of this, the General Fund is now short of necessary funds to complete this year's operation.

"Taking the above into consideration will you please advise me as follows:

"1. Can the Counties reimburse the General Fund from the proceeds of the Luxury Tax for the actual amount expended from March 1, 1937, at which time such Revenue began to accrue to the Counties?"

In my opinion, the question propounded in your letter of inquiry should be answered in the affirmative.

Section 21 of the Alabama Luxury (Sales) Tax Act provides among other things as follows:

"* * * provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension services in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State."

This office in an opinion to Hon. P. C. Black, Judge of Probate, Geneva County, Geneva, Alabama, under date of April 27, 1937, held that the proceeds received by the several counties from the tax levied by this Act must be used by them exclusively for public health, public welfare, and agricultural extension service, the amount of the proceeds of the tax to be used by each of said agencies or units to be determined by the county governing body.

County governing bodies have long had the authority to appropriate, at their discretion, such sum or sums from the revenue in the general fund for the operation of public health, public welfare, and agricultural extension service agencies or units as they saw fit, provided that there was sufficient revenue available in the general fund for this purpose or these purposes after all involuntary obligations against said fund had been met (that is, all obligations of the county, the payment of which out of the general fund is made mandatory by statute). See Section 6755 of the Code of Alabama, 1923, dealing with the authority of the Court of County Commissioners or like governing bodies. Various and sundry statutes dealing with this general subject have been passed since the date of the adoption of the Code of 1923, but none of these has changed the authority of the county governing bodies to appropriate money from the general fund for this purpose or these purposes in any respect here material, and therefore an enumeration of these various statutes would serve no useful purpose and would only tend to lengthen this opinion unnecessarily.

Undoubtedly, the various county governing bodies could have failed to appropriate any sum or sums whatever from the general fund on or after March 1, 1937, for the purpose of carrying on public health, public welfare, and agricultural extension work in their counties. If this had been done, these three agencies or units could not have been heard to complain. This should have been done on that date if there were not available in the general fund sufficient monies with which to pay all involuntarily obligations against it in addition to the amount appropriated for the operation of these three agencies or units, since Act No. 379, General Acts 1935, page 803, approved September 9, 1935, popularly known as the County Financial Control Act, required the various counties to which it is applicable to operate within the income of their general fund.

As stated in your letter of inquiry, the proceeds of the tax levied by the Alabama Luxury (Sales) Tax Act began to accrue to the counties on March 1, 1937, to be used by them exclusively, as held in the opinion to Judge Black, *supra*, for the operation of these three agencies or units. This fund became primarily liable for the expenses incurred in the operation of these three agencies or units as of that date, March 1, 1937, and obligations incurred in the operation of these three agencies or units between March 1, 1937, and the date on which the first proceeds from this tax were made available to the counties for disbursement, could have been paid out of these proceeds when they were received by the counties. If a county governing body of a county, whose income of the general fund was not sufficient to pay all involuntary obligations against it and also these three agencies or units to keep from paralyzing or stopping their operation until the proceeds received from the Luxury (Sales) Tax to be used for this purpose were available for disbursement, with the expectation that the general fund would be reimbursed in the amount so expended from it when the proceeds from said tax were received, then, in my opinion, the fund made up of the proceeds of the Luxury (Sales) Tax received by the counties, which is the fund primarily liable for the payment of the expense of the operation of these three agencies or units since March 1, 1937, became indebted to the general fund in the amount so expended from it in the operation of these three agencies or units during this period. In my opinion, not only have the county governing bodies who so acted the authority to reimburse their general fund from the proceeds from the Luxury (Sales) Tax received by them for the actual amount expended by them since March 1, 1937 for the operation of these three agencies or units, when the money was expended under such circumstances as set out in your letter of inquiry, but they are under a duty to so reimburse the general fund, in such an amount, from the proceeds received by them from this tax.

This opinion is in accordance with the previous holdings of this office on such questions. See Opinion of the Attorney General to Hon. Woolsey Finnell, Highway Director, Montgomery, Alabama, under date of September 28, 1928, Office Edition, Vol. 7, page 220, holding:

"Where funds in the treasury of the state, not primarily liable or intended for a certain expenditure by the State, issued as a temporary expedient, such funds should be reimbursed from the fund primarily liable and intended to be used for such purpose, as soon as practicable."

The particular question dealt with in that opinion was the authority to transfer money from the Highway Bond fund of 1927 in the amount of \$286,087.50 to the Public Road and Bridge or Gasoline Tax fund for the reimbursement of that fund for an amount which had been expended by it

for the payment of an obligation for which the Highway Bond fund of 1927 was primarily liable, sufficient monies not having been available in the Highway Bond fund of 1927 to pay these obligations at the time, from a standpoint of expediency, they should have been paid, and monies available in the Public Road and Bridge or Gasoline Tax fund having been temporarily used for that purpose. This opinion held that not only should such a course be followed but that it became a duty to reimburse a fund so used, temporarily, out of the fund primarily liable, as soon as the condition of the fund primarily liable and intended to be so used permits of such a course of procedure. To the same effect is the holding of the opinion to the Chief Examiner, Department of Examiner of Accounts, Montgomery, Alabama, under date of October 1, 1928, found in Biennial Reports of the Attorney General, 1928-30, at page 3, which opinion dealt with the authority to reimburse the Fish Hatchery fund from the Game and Fish Protection fund for an amount which had been expended from the former for the payment of obligations for which the latter was primarily liable, the monies in the latter having been temporarily depleted at the time.

The premises considered, it is my opinion that a county governing body not only has the authority, but is under the duty, to reimburse the general fund from the proceeds received by it from the Luxury (Sales) Tax in the actual amount expended from the general fund for the operation of public health, public welfare, and agricultural extension service agencies or units since March 1, 1937, when there were not sufficient monies available in the general fund to operate the above named agencies and to also pay all involuntary obligations against it, and such monies were expended for this purpose or these purposes to keep from paralyzing or stopping the operation of these agencies pending the receipt by the counties of the proceeds of the Luxury (Sales) Tax, which was then accruing to them and was primarily liable for and intended to be used for the operation of these agencies or units, and said monies were advanced from the general fund for this purpose or these purposes with the expectation that the general fund would be reimbursed in such an amount from the proceeds to be received by the counties from the Luxury (Sales) Tax. This reimbursement should be made as soon as the condition of the fund made up of the proceeds of the Luxury (Sales) Tax will permit of such a course of procedure without interfering with the adequate full-time operation of these three agencies for which the proceeds of this tax are allocated.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 1, 1937.

Hon. E. C. Whelan,
License Inspector,
Jefferson County,
Birmingham, Alabama.

Licenses—

1. Person operating laundry, cleaning, pressing and dyeing business, pick-up stations, also cleaning feathers, cleaning and blocking hats and cleaning rugs, due license for each business.

2. Person operating lumber yard and also repairing roofs due license for operating roofing shop under Schedule 110 of the Revenue Laws of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"(1) If a laundry pays a license under Schedule 79 and also does business singly or in conjunction with, such as cleaning and pressing and dyeing, also operating pick up stations for cleaning and pressing and dye as described in Schedule 35, also cleaning feathers as described in Schedule 60, and cleaning and blocking hats as described in Schedule 70, and cleaning rugs as described in Schedule 88, would they be due a license under each schedule mentioned above?

"(2) If a person, operating what is commonly known as a cleaning and pressing establishment and paying a license for same under Schedule 35, would they be due a license for doing business singly or in conjunction with as described in Schedule 70 and Schedule 88, especially as to places maintained or operated for the reception or collection of such articles except at the locations where pressing, cleaning or dyeing is done.

"(3) I will also appreciate very much if you will give me an opinion explaining Schedule 110 as we have had considerable trouble in interpreting this Schedule. Practically every person operating a lumber yard and paying a license under Schedule 83, also do a roofing business. For instance, the Walker Lumber Company will sell you roofing material or put an entire new roof on your home. Would they be for the purpose of taxing under Schedule 110 be operating a roofing shop and be liable for a license under said Schedule?"

Answering your first and second inquiries, I advise you that a person operating a laundry and, singularly or in conjunction therewith, operating a business commonly known as a cleaning and pressing and dyeing establishment together with the pick-up stations referred to in Schedule 35 of the 1935 Revenue Law, who also engages in the cleaning of feathers as described in Schedule 60, cleaning and blocking of hats as described in Schedule 70, and the cleaning of rugs, etc. as described in Schedule 88, must pay the license prescribed on each branch of the cleaning business in which he is engaged.

Section 356 of the Revenue Law of 1935 provides:

"Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business."

In accordance with the above, therefore, the party operating as detailed by you in your inquiry No. 1 would pay the following licenses: (Figures are amounts payable in Jefferson County)

Operating Laundry (Sched. 79).....	\$60.00
Operating Cleaning & Pressing Business (Sched. 35).....	15.00
Dyeing done singularly or in conjunction (Sched. 35).....	10.00
Each place maintained as "pick-up" station, not at location of cleaning, pressing and dyeing establishment (Sched. 35).....	5.00
Cleaning and renovating feathers (Sched. 60).....	20.00
Cleaning and blocking hats at "hat cleaning establishment" (Sched. 70).....	10.00
Cleaning rugs, etc. (Sched. 88).....	15.00

What has been said above with reference to the necessity of obtaining a license under both Schedule 35 (the cleaning and pressing license) and Schedule 70 (licensing a hat cleaning establishment) is subject to the limitations mentioned in an opinion of this office rendered May 15, 1937, to Hon. J. P. Laseter, Probate Judge, Barbour County. I enclose herewith for your convenience a copy of this opinion.

In connection with your second inquiry, see also Quarterly Report of the Attorney General, Volume 1, page 295.

Answering your third inquiry, I advise you that Webster says—"In the United States 'shop' means, especially, a place of manufacture or repair." Webster's New International Dictionary (2nd Edition).

Considered in the light of the foregoing definition, it does not appear that the lumber company described in your inquiry, is in fact operating a "roofing shop" within the meaning of the term as used in Schedule 110 of the Revenue Act of 1935 and consequently such party would not be liable for the license prescribed by said Schedule.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 2, 1937

Hon. E. Clyde Hudson,
Tax Assessor,
Blount County,
Oneonta, Alabama.

1. The language of the Constitution and statutes, "any lot in a city, town or village" does not restrict the homestead to one lot or piece of land. Two or more adjoining lots may be occupied and used as a homestead and for this purpose constitute one lot or tract.

2. Owner of farm who lives with his sister on her adjoining farm but who cultivates his own farm upon which there are no buildings, cannot claim tax exemptions on his farm, as being a homestead.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of July 29, 1937, which is as follows:

"Please advise me on the following at once if possible.

"No. 1. I have an assessment of two lots joining 2 houses built across the line of both lots, the owner living in one and his son living in the other without paying rent. Would this man be entitled to an exemption on both houses and lots?

"No. 2. Taxpayer living in his sister's house and cultivating his own land that joints the sister's land, but no buildings on his lands, however making his living on the land that belongs to him. Would he be entitled to an exemption on his land?"

You do not use the word "homestead" in connection with the word "exemption" but I am assuming that your questions are directed to the so-called homestead exemption law recently enacted by the Legislature of this State.

The "Homestead Exemption" Act, approved February 20, 1937, is in words and figures as follows:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama.

"Section 2. Homesteads, as here defined, are hereby exempted from all State ad valorem taxes beginning October 1st, 1937.

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000.00) in assessed value, nor one hundred sixty (160) acres in area."

It is my opinion that your first inquiry should be answered in the affirmative if the value of the lots is more than \$2,000.00 and if they are in area less than 160 acres.

Section 205 of the Constitution provides, in part, as follows:

"Every homestead not exceeding 80 acres, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any city, town, or village, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and appurtenances thereon owned and occupied by any resident of this State and not exceeding two thousand dollars, * * *"

In the case of *Miller v. Marx*, 55 Ala. 322, and in *David v. David*, 56 Ala. 49, it was held that the legislature could increase the exemption too 160 acres which is the law today.

I refer you to the case of *Tyler v. Jewett*, 82 Ala. 93, 99, 2 So. 905, from which I quote:

"The language of the Constitution and statutes 'Any lot in a city, town or village' does not restrict the homestead to one lot or piece of land. Such would be a narrow and strict interpretation, not in harmony with the spirit or policy of exemption laws, nor with the settled rule, that they shall be liberally construed to accomplish their benevolent affects. A lot, or lots, may be surveyed and numbered, or otherwise designated, in the plan or map of the city, town or village, was not contemplated. When the homestead is urban, the limitation relates to the value, and not to the number or extent of the lots. Two or more adjoining lots may be occupied and used as a homestead, and for this purpose constitute one lot or tract. Where a person owns a lot, on which is the dwelling place of himself and family, he may require an abutting lot, and impress the character of the homestead by devoting it, in connection with his dwelling, and as appurtenant thereto, to the appropriate and requisite occupancy and uses, if the limitations as to value is not exceeded." (Emphasis Ours)

The facts set out in your first inquiry are in line with the case of *Code v. Graffo*, 227 Ala. 11, 148 So. 591. They do not come within the operation of the rule stated in *Griffin v. Ayers*, 231 Ala. 493, 165 So. 593.

In my judgment, there is only one homestead and the fact that two houses are located thereon would not deprive the head of the family from receiving the exemption if the entire homestead including both lots and both houses does not exceed \$2,000.00 in value or 160 acres in area.

It is my opinion that your second inquiry should be answered in the negative. I am herewith enclosing a copy of an opinion recently rendered by this office to Hon. J. Russell Gibson, Tax Assessor, Pike County, on August 12, 1937, which answers your question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

County not required to pay trial tax when judgments are against county

Opinion by Assistant Attorney General Knabe

Dear Sir:

I have your letter of August 23, in which you request my opinion as follows:

"Please advise me if the county is due to pay the Three (\$3.00) Dollar trial tax when judgments are entered against the county.

"I will thank you to give me an opinion on this as soon as possible as we have had several condemnation suits in this county in which juries have awarded judgments against the county."

I am of the opinion that the county is not liable for a trial tax where a judgment is entered against the county. This department has held that the State is not liable for this tax. (Opinion addressed to Hon. Chas. W. Lee, as State Comptroller, Capitol, Montgomery, Alabama, Book 4-A of Opinions of the Attorney General, at page 50.) The county is but a part of the state.

In the words of the Supreme Court of Alabama in the case of **Montgomery Superintendent of Banks vs. State**, 228 Ala. 296, 153 So. 394:

"It is not, as supposed by learned counsel for appellant, a case of having two sovereigns in one and the same territory, or jurisdiction. There is but one sovereignty—the state—but that sovereignty extends to every county in the state. For all practical purposes—the effective governmental operation of the state and every political subdivision thereof--there is but one sovereignty, and whatever affects the revenues of the several political subdivisions of the state directly and immediately affects the state. It is a false idea to assume that the county is a separate entity from the state, that its revenues belong exclusively to the county, and are under its absolute control. Such revenues belong to the state, and may be appropriated by the state." (228 Ala. at page 301).

Further, it is the general policy of the state not to tax the counties unless the act clearly intends such taxation. And this is particularly true where part of the tax is to be used for county purposes. (See Opinion in the case of **Henry S. Long v. Roberts & Son**, 3 Div. 212, now on rehearing, in manuscript, with cases therein cited.) Half of the trial tax is definitely for the use of the counties.

I am therefore of the opinion that the county is not required to pay the trial tax when judgments are against the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. F. G. Hereford,
Sheriff, Madison County,
Huntsville, Alabama.

September 16, 1937.

Where a defendant on trial in a Justice of Peace Court, demands a jury trial, the only process by which the prosecution can continue

is by indictment by grand jury, unless the statute prescribing the offense specifically provides otherwise.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of August 20, 1937, in which you request my opinion as follows:

"In regard to proceedings in Justice of Peace Courts as to bonding cases. We are having considerable trouble in this County in view of that fact that we cannot get the right opinion from authorities in this county as to whether or not a defendant charged with speeding, violating Alabama Traffic laws, etc., can in such case waive case to the Grand Jury. If this is true beg to inform that in my opinion we are at our roads end, as the Grand Jury in Madison County will not return indictments in cases of this kind.

"The Alabama Highway Patrol with several authorities of the Code to bear them out, informed me some time ago that no cases that they were making were being taken to the Grand Jury from Justice of Peace Courts. I was under the impression from Section 3854 of Criminal Code 1923, when defendant appears at Justice of Peace Court for trial, and demands a jury trial he is compelled to enter into bond with good sureties, pending the next session of the Circuit Court, failing to do so he must be committed to jail.

"Would like very much if you would help us out in any way you can, as we don't know the next step to take."

Section 3854 of the Code of Alabama of 1923 provides as follows:

"Section 3854. Proceedings when defendant demands trial by jury.— If the defendant demands a trial by jury, he must be required to enter into bond, when good sureties, conditioned for his appearance at the next session of the circuit court of the county to answer the charge; and failing to give such bond, must be committed to the county jail until the next session of the circuit court having jurisdiction of the offense unless he elect, in the meantime, to perform hard labor for the county as provided by law."

In construing this Section the Alabama Court of Appeals in the case of *Elmore v. State*, 24 Ala. App. 368, 137 So. 462, summarizes the law in these words:

"In the circuit court, unless otherwise specifically provided by statute the only process by which the prosecution can continue is by indictment by a grand jury. *Streanger v. State*, 21 Ala. App. 600, 110 So. 595."

"The trial court erred in placing the defendant on trial without an indictment. (Paragraph numbered 3 at page 370)."

The case of *Collins v. State*, 218 Ala. 250, 118 So. 265, is an illustration of the application of a statute which provides for a trial in the circuit court

without indictment. In that case the Act under which the defendant was being tried as quoted on page 252 of the opinion, read in part:

"the person charged shall **not** have the right to demand that a grand jury prefer an indictment for the alleged offense, except where such offense is a felony, but the prosecution may continue no matter in what court or before what judge the trial shall be had **upon the affidavit upon which it was originally begun.**" (Underscoring supplied).

It is therefore not a denial of due process of law for a statute to make such a provision in reference to misdemeanors. However, in the absence of such a provision, an indictment is required. The opinion addressed to Hon. W. H. Quillin, Solicitor Law and Equity Court, Russellville, Alabama, dated March 26, 1929, and found on page 241 of the 1928-30 Biennial Report of the Attorney General, is hereby modified to conform to this opinion.

In the prosecution of each case, you should therefore examine the statute under which the prosecution is brought. For your information, in reference to the offenses set forth in "Rules of the Road," Article II of an Act approved August 23, 1932, (1932 Act at page 363), no provision is made for trial without indictment, and therefore, if the defendant demands a jury trial, in a Justice of Peace Court, his case should be referred to the Grand Jury.

I call your attention to a Local Act affecting Madison County, which provides that the prosecution of misdemeanors may be begun by affidavit "made before the Clerk of the Circuit Court of Madison County," and that thereupon the jurisdiction of the Circuit Court of Madison County shall attach, and the same shall proceed to trial and judgment under the same rules and procedure as provided by law in misdemeanor causes. (1919 Local Acts, p. 17).

Under this act, the Clerk of the Circuit Court of Madison County has vested in him "power of a judicial nature" to issue warrant as to misdemeanors (*Collins v. State*, supra), and in such cases, indictment is not necessary.

This however, is not the situation which you mention in your inquiry. Under the circumstances detailed by you, the prosecution is begun before a justice of the peace and therefore, the provisions of the Local Act do not apply. *Jones v. The State*, 149 Ala. 63, 43 So. 28.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. J. D. Sexton, Clerk,
Circuit Court, Marion County,
Hamilton, Alabama.

1. Clerk of the County Court who acts as Clerk of the Judge of the County Court when sitting as Committing Magistrate, is entitled to his fee of two dollars, even though the act giving such fee was passed after he assumed office.

2. The fee of two dollars provided for where the clerk of the county court acts as clerk of the Judge of County Court sitting as a Committing Magistrate cannot become a claim against the Fine and Forfeiture Fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 22, 1937, in which you request my opinion as follows:

"At Special Session, 1936-1937 House Bill 71—(Merrill) Senate No. 225 was enacted by the Legislature. This act became effective upon its approval by the Governor as of March 2, 1937.

"Under the terms of this act the Clerk of County Court shall act as clerk to Committing Magistrate in committing proceedings in criminal cases.

"Further, the clerk of the County Court shall be entitled to a fee of two dollars in cases where the defendant is subsequently convicted and sentenced to the penitentiary or to hard labor and this fee is to be taxed in cost bill and paid by the Convict Department.

"Question 1.—Will a clerk of County Court who serves in committing proceedings, and who is in all respects qualified to receive fee of \$2.00 in such committing proceedings be entitled to the fee in mid-term, or would the provision of our Constitution with reference to increasing compensation while in office prevent such clerk claiming this fee?

"Question 2.—Will this fee of two dollars be a claim against the Fine & Forfeiture Fund of the County in cases in which the defendant is not convicted, and such other claims as are outlined in Section 4039, Code of 1923, as amended Acts of 1927, page 45?"

Answering your first request, I am of the opinion, you, even though this bill was passed and became a law after your term began, would be entitled to this fee in preliminary matters which come before the Judge of the county court sitting as a Committing Magistrate. This Act, while it increased your compensation, at the same time, it adds additional duties on the clerks of the County Court and is not repugnant to Section 281, Constitution of Alabama, 1891. **Taylor v. Davis**, 212 Ala. 282; **Jackson v. Sherill**, 207 Ala. 245.

Answering your second request, I am of the opinion this fee of two dollars allowed the clerk of the county court for acting as clerk of the Judge of the county court in sitting as a Committing Magistrate is paid as all other costs in preliminary hearings. That is, that this particular fee is paid under the provisions of Section 3755, Code of Alabama, 1923, which is as follows:

"Section 3755. Costs and fees in preliminary trials. — Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs of the committing magistrate and constable on preliminary trial, both together, not to exceed ten dollars, and the fees of the

state's witnesses before the committing magistrate, not to exceed ten dollars, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way, as is provided by law for the payment of other items of costs incurred by the state; but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

This fee becomes a part of the ten dollar preliminary costs as provided above, but this is only paid on conviction. Then again, if the defendant is sentenced to the penitentiary on a hard labor, then under Section 3667, Code of Alabama, 1923, this fee is reduced and the State only pays five dollars—and the clerk will get only his proportionate share. Of course, if the defendant pays the fine and costs or confesses judgment for same, then the preliminary costs would be paid in full and would be ten dollars. Therefore, this fee or any other preliminary costs, that is, costs accruing on preliminary examination, can never be paid out of the fine and forfeiture fund of the county, for the reason this preliminary cost as shown by Section 3755, supra, is never paid except on conviction, and where there is a conviction, then the defendant becomes responsible for same and it does not fall under the provisions of Section 4039 as amended by an Act approved February 18, 1937, General Acts, 1927, p. 45.

You will note the Act above referred to, which was approved March 2, 1937, General and Local Acts, Special Session of 1936-37, p. 268, reads as follows:

"Section 1. In all criminal cases where the Judge of the County Court shall sit as committing Magistrate, the Clerk of the County Court shall act as clerk to such committing Magistrate in said proceedings, and when the defendant is subsequently convicted and sentenced to the penitentiary or to hard labor, the Clerk of the County Court shall be entitled to a fee of Two Dollars to be taxed in the bill of costs in the same manner and paid out of the same fund, at the same time and in the same way as is provided by law for the payment of other items of costs incurred by the State."

It is evident from the above that it has reference to costs provided for in preliminary examinations which costs are set out by Section 3755, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Judge of Probate or Chairman of Board of Revenue, and not board itself, is authorized to employ assistants under Sections 8 and 8-½ of the County Financial Control Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your inquiry of July 15, 1937, as follows:

"Please refer to County Financial Control Act, Acts 1935, page 803, Sections 8 and 8-½ as follows:

"1. After an appropriation for compensation for the work of keeping this record is provided, who has the authority to hire a Clerk to keep such record? The Chairman of the Board or the Board as a body?"

Section 8 of the County Financial Control Act to which you refer provides that the Board of Revenue shall provide for a record of the financial status of the county. Section 8½ of said Act reads as follows:

"SECTION 8-½.—WHO SHALL KEEP SUCH RECORD. The record provided for in the next preceding section shall be under direction of the Judge of Probate, or the Chairman of the Board, whose duty it shall be to keep this record up to date at all times, and to perform any other duties with reference to accounting, auditing claims, issuing warrants, and supplying such Board with information, as they may deem necessary for the administration of the financial affairs of the County; provided that the Board of Revenue, Court of County Commissioners, or other governing body shall provide for the payment of reasonable compensation for the work of keeping this record."

This Act specifically provides that it shall be the duty of the Judge of Probate or Chairman of the Board to keep the record. I am of the opinion that the Judge of Probate or Chairman of the Board is authorized to hire whatever help is needed for this work. The responsibility is on the Judge of Probate or the Chairman of the Board to do the work and I am of the opinion that in the absence of a provision to the contrary, the Legislature intended that he and not the Board of Revenue shall have authority to hire an assistant.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hon. John M. Graham,
Tax Assessor,
Jackson County,
Scottsboro, Alabama.

Homestead Exemption Act—

Where homestead is willed to widow, the fact that property has been assessed to the estate of the deceased would not bar right of such widow to homestead exemption.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of August 17, 1937, in which you request my opinion as follows:

"I have an application for Homestead Exemption as follows:

"J. D. Snodgrass, deceased, willed all of his property to his widow, who lives in the home, at the same time he made his son, Captain Jno. M. Snodgrass, Executor. The Homestead is of course assessed in the name of J. D. Snodgrass Estate. Captain Jno. M. Snodgrass has applied for Homestead Exemption for her. What shall I do in this case?"

As I understand your letter the property was willed to the widow but has been assessed in the name of the J. D. Snodgrass Estate. In the opinion of this office to Hon. T. D. Woodham, dated August 10, 1937, Headnote (f) it was held that the fact that the property was erroneously assessed would not affect the right of the true owner to exemption from taxation. In my opinion, therefore, such widow is entitled to the homestead exemption under the facts set out in your letter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 16, 1937.

Hoon. J. Elmore McAdory,
Deputy Tax Assessor,
Jefferson County, Bessemer Div.,
Bessemer, Alabama.

Taxation — Homestead Exemption — Act 107, General Acts of 1936-37, p. 113.

1. A minor child owning house and lot, where he resides with his parents, as a homestead, and neither parent owning any property, the parent of said minor child, as head of the family, is entitled to claim homestead exemption on behalf of said minor.

2. Homestead exemption law has independent application apart from the statutes pertaining to the exemption of homestead from levy and sale under process, and exemption of homestead in favor of widow and minor children.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"1. 'A' owns a vacant lot in the City of Bessemer which he cultivates, raising vegetables of various kinds for the use and benefit of his family. He does not own any other property of any kind. He lives in a rented house. Would this person be entitled to the exemption allowed on a homestead?

"2. 'A' owns a house and lot in the City of Bessemer. He also owns a vacant lot situated in a different block than that on which his homestead is located, on which he has a garden, raising vegetables for use and benefit of his family. The total assessed value of both pieces is less than \$2000.00. Would he be entitled to the homestead exemption on both lots, or on the lot on which his dwelling house is located?

"3. A minor child owns a house and lot which is being used by himself and parents as a home. Neither of the parents own any interest of any kind in any other property. Would the parents or this minor child be entitled to the Homestead exemption allowed under the recent Acts of the Legislature?

"4. 'A' owned two houses and lots at the time of his death. He did not leave any will. There are surviving him a widow and several minor children who reside in one of these houses. The widow holds only a right to use the property during her life-time with actual title in the minor children. Can the mother of these children claim the exemption allowed under the Homestead Exemption Law?

"5. Under this Homestead Exemption Law, would the Statutes and Laws pertaining to the exemption from levy and execution govern, or would the law pertaining to homestead exemptions to the widow and minor children, either or both, govern in arriving at what exemption, if any, a person would be entitled.

"6. 'A' owns a house and lot in the City. On the rear end of this lot he has a small house which at one time was used as a servant's home. He now rents the same to a tenant. The whole of the value of this lot and all improvements are less than \$2,000.00. What exemption would be allowed under the Homestead Exemption Act passed by the recent Legislature?

"7. 'A' purchases a piece of property under lease sale contract. The seller carries this property in his assessment, charging the taxes to the purchaser. Can the purchaser claim this as his homestead and thereby reduce the amount of taxes which the seller would pay and in turn reduce the amount the purchaser would reimburse to the seller?"

In my opinion your third question should be answered to the effect that the parent of a minor child, as head of the family, would be entitled to claim the homestead exemption on behalf of said minor, where said child owns the house and lot in which he resides with his parents, who own no property of any kind. Section Three of the Homestead Exemption Act, approved February 20th, 1937, General and Local Acts of Alabama, Extra Session 1936-37, page 113, appears to limit the right to claim exemption to the head of the family, but by reading the Act in its entirety, together with the Constitution and Laws of Alabama, pertaining to homesteads, it will be seen that the Legislature intended that the Act should have a broader application in its scope

than Section 3 alone would imply. Sec. 7882, Code of Alabama of 1923; 77 So. 406; 6 So. 383.

In answer to your fifth question, in my opinion the New Homestead Exemption Law, which is the question we are now dealing with, has its independent application, apart from the statutes pertaining to the exemptions of homesteads from levy and sale under process, and the exemptions of homesteads in favor of widows and minor children. Neither of said statutes governs the application of the Act in question, but when considered along with the Act tends to broaden its scope and its meaning. **Section 205 Constitution of Alabama; Section 7882 and 7918 of the Code of 1923.**

With reference to questions 1, 2 and 4, I respectfully refer you to an opinion of this office addressed to Mr. T. D. Woodham, Ozark, Alabama, dated August 10, 1937. Syllabus (a) (b) and (d) respectively answer your questions 1, 2 and 4.

For answer to question 6 in your letter, you are referred to an opinion of this office to Mr. McAdory, Deputy Tax Assessor, Bessemer, Alabama, dated August 12, 1937. With reference to question 7, which you propound, please refer to an opinion of this office to Mr. Roy Johnson, Tax Assessor, Birmingham, Alabama, dated April 27, 1937. Copies of these opinions are enclosed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 18, 1937.

Hon. Elmer L. Vinson,
Tax Collector,
Limestone County,
Athens, Alabama.

Qualified electors — Poll tax and registration—

1. Persons who owe back poll tax which they pay between October 1st of a given year and the time of the general election held in that year are not entitled to vote in said election.
2. Persons who have become twenty-one years of age since the primary election and have regularly registered are entitled to vote in the general election held in a given year.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter as follows:

"We have several persons who are one or more years behind with their poll tax and are left off the qualified voting list in the Probate Office and did not vote in the Primary election. If they will pay up all back poll tax between now and November 3, will they be in a position to vote in the General Election?"

"Also some have become twenty one since the Primary and registered in the regular manner and paid poll tax. Could the Probate Judge issue a certificate to these persons to present to the election official in order that they may vote?"

"Would appreciate an early reply as we have some who do not want to pay back poll tax unless they can vote in the General Election."

In reply, I advise that persons who owe back poll tax and pay the same between October 1st of a given year and the time of the holding of the General Election are not entitled to vote in said election. This office, in an opinion addressed to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 29, 1935 (Quarterly Report of Attorney General, Vol. 1, page 249) held that a person who paid back poll tax subsequent to February 1st of a given year was not entitled to vote in any election held between February 1st of that year and February 1st of the next succeeding year. Therefore, when a person who pays back poll tax between October first of a given year and the time of the holding of the General Election in that year would not be entitled to vote in said election, I enclose herewith for your information copy of the opinion to Judge Price above cited.

As to persons who have become twenty-one years of age since the primary election and have regularly registered, it is my opinion that such persons are entitled to vote in the General Election to be held in that year. Act No. 155, General Acts 1936 at page 174, approved April 21st, 1936, provided for additional registration periods in July of each year in all counties in the State in a certain population classification. Your county comes within this population classification. The last sentence of Section 1 of this Act reads as follows:

"Any voters who may become qualified after a qualified voting list has been made and published as now provided for by law during even numbered years may be added to the list of qualified voters by a supplementary list or lists without making a complete new list of qualified voters."

This act could serve no useful purpose unless it gave to persons who become twenty-one years of age after the regular registration period the right to register and thereby become eligible to vote in the General Election. A person who becomes twenty-one years of age after October 1st of a given year becomes eligible to vote, without the payment of poll tax, immediately upon his registration, provided he is not otherwise disqualified. Such a person owes no poll tax until October 1st of the year following. See opinion to Hon. L. W. Price, supra, and opinion to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of March 3, 1936, (Quarterly Report of Attorney General, Vol. II, at page 251).

In your letter of inquiry you state that these persons who have become twenty-one since the primary have registered in the regular manner and

paid poll tax. I presume that the poll tax there referred to by you as having been paid was the poll tax which these persons became liable for on October 1st, since they were not due any poll tax prior to that time. You will note from the opinions above cited that when a person pays the poll tax which he is due on October 1st of a given year at any time between that date and February 1st of the following year that the payment of said poll tax gives him the right to vote in any election held between that February 1st and February 1st of the next succeeding year. So it can be clearly seen that a person who has become twenty-one years of age since the primary in any given year and registered in the regular manner is entitled to vote in the general election held in that year whether he pays the poll tax which becomes due on October 1st of that year or not.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. R. J. Westbrook,
Clerk of the Circuit Court,
Marengo County,
Linden, Alabama.

Balance of cost of conviction of felony over and above \$250.00 paid by the State may become a charge against the Fine and Forfeiture Fund of the county where execution is returned "No Property Found."

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 17, 1937, in which you request my opinion as follows:

"In a murder case, the State pays \$250.00 and where the cost exceeds this amount, I pro rate the sum of \$250.00, and I would like to know if the balance due can be registered against the fine and forfeiture fund by my endorsing amount due on said tickets."

Under Section 3668, Code of Alabama, 1923, two hundred and fifty dollars (\$250.00) is all the costs the State will pay where a person is charged with a felony and sentenced to the penitentiary. If the cost amounts to more than the amount paid by the State, then, it is my opinion there should be a judgment against the defendant for all the costs. The amount collected from the State should be credited on the judgment and the amount collected from the State should be pro rated and execution issued against the defendant for the balance. If execution is returned "No property found" then, the amount above and over \$250.00 paid by the State would become a charge against the fine and forfeiture fund of the county. Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927. (General

Acts 1927, page 45). The above holdings only apply to felony cases. The rule is different in hard labor cases.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. Haygood Paterson,
Sheriff, Montgomery County,
Montgomery, Alabama.

Uniform Firearms Act—

Under the provisions of Act No. 82, S. B. 63, approved April 6, 1936, (General Acts, 136, page 51) as amended in part by Act No. 190, H. B. 61, approved March 2, 1937, (General Acts, 1936-37, page 223) all persons except those exempt under Section 6 are required to obtain permit before carrying pistol.

Permit to carry pistol issued by Sheriff of a county to residents of that county only.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date which is as follows:

"Please at your earliest convenience give me a ruling on the following questions:

"Are railway express employees who are in charge of valuables and who are bonded, required to have permit under pistol act?

"If permits are required can supt. of company, have same issued for all employees in the State at his home office in Birmingham, Ala."

The Uniform Firearms Act was enacted by the 1936 Legislature, Act No. 82, S. B. 63, approved April 6, 1936 (General Acts, 1936, page 51). Section 5 of said Act provides:

"Section 5. CARRYING PISTOL: No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as herein-after provided."

Section 6 of said Act provides:

Section 6. **EXCEPTION:** The provisions of the preceding section shall not apply to marshals, sheriffs, prison or jail wardens or their deputies, policemen or other law-enforcement officers, or to members of the Army, Navy or Marine Corps of the United States or of the National Guard or Organized Reserves when on duty, or to the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States or from this State, provided such members are at or are going to or from their places of assembly or target practice, or to officers or employees of the United States duly authorized to carry a concealed pistol, or to any person engaged in the business of manufacturing, repairing or dealing in firearms or the agent or representative of any such person having in his possession, using, or carrying a pistol in the usual or ordinary course of such business, or to any person while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his home or place of business or to a place of repair or back to his home or place of business or in moving from one place of abode to another."

Unless the railroad express employees come within one of the exceptions of Section 6, *supra*, it will be necessary for them to obtain permits to carry pistols. From the information stated in your letter, it does not appear that they can come within one of the exemptions above set out.

Section 7 of the original Act was amended by Act No. 190. H. B. No. 161, approved March 2, 1937, (General Acts, 1936-37, page 222). The amended section provides as follows:

"Section 1. That Section 7 of 'an Act to regulate the sale, transfer and possession of certain types of firearms; to provide for the licensing of dealers and owners of such firearms; to fix rules of evidence in the courts of this state in prosecutions for violation of this act; to prescribe penalties for the violation of any provisions herein and to make uniform the law with reference thereto,' Approved April 6th, 1936, be amended so as to read as follows: Section 7. **ISSUE OF LICENSES TO CARRY:** The Sheriffs of a County, may upon the application of any person residing in that county issue a license to such person to carry a pistol in a vehicle or concealed on or about his person within this state for not more than one year from date of issue, if it appears that the applicant has good reason to fear an injury to his person or property, or has any other proper reason for carrying a pistol, and that he is a suitable person to be so licensed. The license shall be in triplicate, in form to be prescribed by the Secretary of State and shall bear the name, address, description, and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee, the duplicate shall within seven days be sent by registered mail to the Secretary of State and the triplicate shall be preserved for six years, by the authority issuing said license. The fee for issuing such license shall be fifty cents (\$.50) which fee shall be paid into the County Treasury."

It will be seen from the above that the license can be issued **only by the sheriff of the county to any person residing in his county** although the permit may be good throughout the State. In other words, the sheriff of one county cannot issue a permit to a resident of another county to carry a pistol. It therefore follows that the superintendent of a company can have

permits issued to its employees only by the sheriff of the county in which the respective employees reside.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

State-wide Highway Planning Survey,
Capitol,
Montgomery, Alabama.

Attention Mr. Harvey, Jr.

Governmental Agencies—

1. County Board of Health is agency of the State.
2. County Department of Public Welfare is agency of the County.
3. City and County Boards of Education are agencies of the State.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request, which is as follows:

"The Alabama State Highway Department through a State - wide Planning Survey being conducted by the State Highway Department in cooperation with the United States Bureau of Public Roads is carrying on as one of its phases of activity a Financial Survey. This phase of the State-wide Planning Survey is attempting to secure certain fiscal data on the units of government within the State, that is, the State, the counties, and the incorporated municipalities. Differences of opinion have existed among the Planning Survey authorities as to the nature of certain agencies; namely, county boards of health, county departments of public welfare, and county and city boards of education, as to whether they should be considered as local or State agencies.

"We, therefore, request an opinion from you as the Attorney General of the State of Alabama as to this question: 'Are the above mentioned agencies State or local agencies?' "

In my opinion, your inquiry should be answered as follows:

1. A County Board of Health is an independent agency of the State. Cf. *Mobile County v. Kimbell and Slaughter*, 54 Ala. 56. See *Hard v. State ex rel. Baker*, 154 So. 71, 228 Ala. 151.

2. A County Department of Public Welfare is an agency of the County. Public Welfare primarily, although not exclusively, is a county function. Section 88, Const. of 1901. Cf. Beeland Wholesale Co. v. Kaufman, 174 So. 1546, Hn. 28, 29.

3. A County Board of Education is "a quasi corporation and constitutes in fact an independent agency of the State for the purposes enumerated * * * " in the statutes. Kimmons v. Jefferson County Board of Education, 204 Ala. 384. Cf. State v. Tuscaloosa County, 233 Ala. 611.

4. A City Board of Education is an independent agency of the State for the purpose for which it was created. The only material difference between the City Board and County Board of Education is in the territorial extent of their respective jurisdictions. See Article IX, School Code of 1927.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. J. Russell Gibson,
Tax Assessor, Pike County,
Troy, Alabama.

Taxation — Homestead Exemptions—

1. Married woman who owns homestead may claim exemption from taxes.

2. Joint owners who actually occupy homestead may claim fractional exemption from taxes.

3. Ownership and occupancy of homestead as of October 1, 1936, necessary to warrant exemption from taxes due October 1, 1937.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. I would like an opinion from you on the following:—If two sisters own a home and one is married and her husband lives in the home with them and the husband owns one fourth undivided interest in a home in another part of the city is the sister that is married entitled to her homestead exemption?

"2. If four people own a home and two of them occupy the home are all entitled to the homestead exemption or just the two that live in it?"

"3. A man owns two houses and lots and his wife owns a house and the man lives in his wife's house is either one entitled to the exemption?

"4. To obtain an exemption on a homestead is it necessary that the person owned and occupied his home on the 1st day of October, 1936."

Your first question has been answered in a former opinion of this office addressed to the Tax Assessor of Dale County, Alabama, under date of August 10, 1937. I am enclosing herewith a copy of the opinion. By reference to that part of the opinion lettered (h) you will see that your inquiry is answered in the affirmative.

Your inquiry No. 2 has also been answered by that part of the said opinion lettered (e), which holds that joint tenants actually occupying property as "homestead" may claim a fractional part of the homestead exemption in the land. Of course, those joint owners who do not reside on the property nor use the same as any part of their homesteads, cannot claim any fractional part of a homestead exemption in the said land.

Your question No. 3 has also been answered by that part of the said opinion lettered (j). Under the facts submitted by you in your third inquiry, the wife might claim her homestead exemption in the house which she owns, in which she and her husband reside, but the husband could not claim a homestead in the other two houses owned by him.

The question No. 4 has also been answered in the affirmative in the part lettered (g) of said opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. John M. Graham,
Tax Assessor,
Jackson County,
Scottsboro, Alabama.

Taxation — Homestead Exemption—

1. Exemption effective although exemptioner lets part of homestead.
2. Exemptioner may make claim of tax exemption by agent.
3. Abandonment of homestead is question of fact in each individual case.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. A taxpayer assesses 75 acres, his home, and a small renter's house. He rents out 16 acres and the small house.

"I have deducted the valuation of the 16 acres and the small house used by renter and given taxpayer exemption on valuation of his own dwelling and the remainder of land which is 59 acres.

"Taxpayer claims he should be allowed exemption on every acre and the house in which his renter resides.

"2. We have a widow taxpayer who owns 97 acres of land. There are two houses on the farm, one being occupied by her and the other by her son, who has a separate family. The mother is 79 years of age and of course unable to tend the land herself. The son rents his land on a share crop basis. Would this lady be entitled to full exemption or merely exemption on the house in which she lives and the few acres which is used by her as garden, etc? The assessed value of said farm is \$1200. Would the son be permitted to sign homestead exemption papers. He has attended to all her tax matters for several years.

"3. We have several cases of temporary absence from farms. Many of which the farms are rented out and the length of absence indefinite. Would such persons be permitted to claim homestead exemption on farms under temporary absence when stating that they fully intend to return to said home at a time not fully decided upon? Just how long a period is covered by temporary absence?"

Under the facts submitted in your first inquiry, you have erroneously denied to the taxpayer the right to claim homestead exemption on the entire tract of land, provided, of course, that the assessed value thereof does not exceed \$2,000.00.

If the taxpayer occupies the property as his homestead, the fact that he rents a small portion thereof and a house situated thereon to another will not deprive him of his right to tax exemption under the Homestead Tax Exemption Act.

Your second inquiry, for the same reason, should be answered in the affirmative, that is to say, the taxpayer should be allowed exemption from taxation on her homestead to the extent of the 97 acres.

In my opinion the son, or any other duly authorized agent of the taxpayer, may make the claim of homestead exemption for the taxpayer.

The facts submitted in your third inquiry are not specific enough on which to predicate an opinion.

With reference to temporary absences from home, the Supreme Court in the case of **Fuller v. American Supply Co.**, 185 Ala. 512, 516, 517, in speak-

ing to the question in connection with the filing of a declaration of homestead provided for in Section 7914 of the Code of 1923 said:

"Before the statute in question it was never supposed that a homestead exemption could be lost by temporary withdrawals, as, for example, where the owner leaves for the purpose of educating his children, to recuperate his health, to travel in foreign parts, to attend a camp meeting, to engage temporarily in trade, to seek work, to raise a crop, or to hold official position, intending all the while to return. Occasions for some such absences come to nearly every one, and they were not regarded as constituting an abandonment. In such cases the owner was regarded in law as in the actual occupancy of his homestead. Any other interpretation of such absences would make of the homestead, not a refuge, but a prison. An owner, absent on such occasion, has all along been commonly regarded as an actual occupant, and he must be still so regarded, unless the statute has clearly provided to the contrary. A homestead, once acquired, is presumed to continue until a change, *facto et animo*, is shown."

Of course, if the taxpayer leaves his homestead temporarily and files a declaration provided for by the above cited section, a *prima facie* case of intention to return to the said homestead is made, and in the absence of fraud, the taxpayer would be entitled to the benefit of the *prima facie* presumption so raised.

However, each case must be dealt with according to the particular facts involved therein and no general statement can be made which will fit any and every situation which may arise. There is no fixed period during which the owner of the homestead may absent himself therefrom without the same constituting an abandonment of his homestead. The surrounding circumstances and the bona fide intention of the taxpayer must be considered in each individual case.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Costs—

Section 3 of Act 227 H. B. 88, approved March 1, 1937, (General Acts, 1936-37, page 270) relative to fees and guardianship settlements of disabled veterans under the Uniform Veterans Act controls over fees provided for in Section 7285, Code of Alabama, 1923, for probate judges generally.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of recent date which is as follows:

"Under an amendment passed during the last session of the legislature, amending the 1931 Uniform Veteran's Act:

"The costs and fees exclusive of fees of the guardian-ad-litem incident to any partial or final settlement by any guardian subject to the provisions of this Act shall be taxed in the amounts provided by the general statutes for like services, but of such costs and fees there shall not be taxed or charged against the estate of the ward, on any partial settlement, any amount in excess of one-half ($\frac{1}{2}$) of one per centum (per cent) of the amount of money with which the guardian is chargeable on the settlement as having received since the last preceding settlement and with which the guardian has not previously been charged."

"In a great number of cases the court costs will not exceed \$2.00 on partial settlement, under this new Act. Will you kindly advise, if, in your opinion, when an estate is large enough to exceed the regularly fees under Probate Court fee bill (Section 7285), should we collect the one-half of one percentum, or should we collect under Section 7285 of the 1923 Code of Alabama."

In answer to your inquiry, I am of the opinion the proper fees chargeable and collectible in the cases under consideration are determined by Section 3 of Act No. 227, H. B. 88, approved March 1, 1937, (General Acts, 1936-37, page 270). Said section deals with the fees in certain classes of cases and governs all of the general provisions of Section 7285, Code of Alabama, 1923, which deals with fees of probate judges in general. Special provisions relative to specific subjects and general provisions relative to general subjects and things specially treated will be considered as exceptions to the general provisions.—*Herring v. Griffin*, 211 Ala. 225, 100 So. 202. Moreover, the 1937 Act is the one of later passage and will govern over the 1923 Code Section.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 20, 1937.

Hon. E. J. Huet, Clerk,
Inferior Criminal Court of Mobile,
Mobile, Alabama.
Alabama Beverage Control Act:—

1. The Solicitor's fee in prosecutions for violation of the Alabama Beverage Control Act is the same as the fee in prosecutions for violation of the old prohibition law, viz: \$30.00, and a warrant or affidavit charging defendant with sale, possession or disposing of spirituous liquors contrary to law, can apply either to violation of the Alabama Beverage Control Act, or the old prohibition law.

2. There is no provision in the Alabama Beverage Control Act which requires any part of a fine assessed in criminal prosecutions under the Act to be remitted to the State instead of the County.

Opinion by Assistant Attorney General Hill.

Dear Sir:

I have your letter of August 10th, 1937, in which you request my opinion as follows:

"Will you please give me your opinion and answer to the following questions:—

"1. Under the old prohibition law, the solicitor's fee in cases involving violation of the prohibition law is \$30.00. In all other misdemeanors not especially provided for, the solicitor's fee is \$10.00. Under the Alabama Beverage Control Act should I collect, in prosecutions, a fee of \$30.00 or a fee of \$10.00? Some of our warrants and affidavits charge defendants with sale, possession or disposing of spirituous liquors, contrary to law; when such is the case, is the prosecution under the old or new law?

"2. Is there anything in the act which would require all or any part of the fine to be remitted to the State instead of to the County; the fine going to the County in all other cases."

In reply to your first question, I wish to advise you that it is my opinion that the Alabama Beverage Control Act has not changed the amount to be allowed and collected as Solicitor's fee in the prosecution of persons violating either this Act or the old prohibition law. To the contrary, the Act clearly says that nothing therein contained shall be construed as repealing any law fixing fees due officials for the enforcement of any and all laws, including the Alabama Beverage Control Act, but that said laws fixing fees for such officials shall remain in full force and effect. I wish to call your attention to Section 61 of the Alabama Beverage Control Act, and, particularly, to that part underscored. Section 61 is as follows:

"Section 61. All laws and parts of laws in conflict herewith, either special or general except as herein otherwise specially provided are hereby repealed, provided that nothing herein shall relieve any person, firm or corporation from any penalty or tax liability or forfeiture incurred under former laws, and nothing herein contained shall be construed as repealing any of the laws of Alabama relating to the manufacture or possession of illicit distilled liquor or apparatus for the manufacture of same, nor any law now fixing fees to officials for the enforcement of any and all laws, including this Act, but the same shall remain in full force and effect. Provided, however, that neither this Section nor any of the provisions of this Act shall affect in any way offense already committed, or any indictment already found for the violation of the prohibition laws of this State or any pending criminal action based upon such laws."

Where your warrant or affidavit charges defendant with sale, possession or disposing of spirituous liquors contrary to law, it is my opinion that

it may apply to prosecutions under either the Alabama Beverage Control Act, or the old prohibition law. The Alabama Beverage Control Act did not repeal the old prohibition law or any part of it that is not in conflict with the Act. You will note in the above quoted Section 61 of the Alabama Beverage Control Act that it only repeals those laws and parts of laws in conflict with the Act.

In my opinion, your question numbered two would be answered in the negative. There is no provision in the Alabama Beverage Control Act which requires all or any part of a fine collected in a criminal prosecution for violation of the Act to be remitted to the State instead of to the County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 22, 1937.

Hon. I. I. Moses,
Chairman, County Commission,
Russell County,
Girard, Alabama.

Workman's Compensation Act—Counties may elect to come within provision of the Workman's Compensation Act in regard to their road employees if proper procedure is followed. Premium on policies is payable out of the General Fund and not out of the Gasoline Fund or the Road and Bridge Fund.

Opinion by Assistant Attorney General Screws:

Dear Sir:

I have your letter of recent date, which is as follows:

"Russell County is contemplating securing Workman's Compensation Insurance for the protection of its employees engaged in road work for the County and the County Commission of Russell County would like to be advised about the following question:

"1. Can Russell County pay the premium for Workman's Compensation Insurance out of the gasoline tax fund received by the County and which is collected by the State and paid to the County?

"2. Can the premium on Workman's Compensation Insurance on the employees of the road department of Russell County be paid from the proceeds of the special two and one half mill tax levied under Section 215 of the Constitution for road and bridge purposes?

"If the County cannot pay the premiums on Workman's Compensation Insurance from either of the above mentioned funds can it make payment of such funds out of the general funds of the County?"

Before definitely answering your inquiry it is first necessary to determine whether or not counties come within the provisions of the Workman's Compensation Act. This office has recently held that counties may come within the provisions of said Act if proper procedure is followed and all former opinions of this office on this subject were overruled. **Biennial Report of the Attorney General, 1930-32, page 160; Quarterly Report of the Attorney General, Vol. 5, page 107.** In connection with the procedure to be followed so that the county may elect to come within the provisions of the Workman's Compensation Act, I especially refer to the opinion in the Biennial Report of 1930-32, page 160. Assuming that the county has properly elected to come within the terms of the Workman's Compensation Act, the question then presents itself as to what fund or funds the premiums on the insurance should be paid from. In instant case, the insurance is on the employees of the road department.

There is no specific provision for the payment of the premium on workman's Compensation Insurance. However, since this authority is granted it follows by necessary implication that premiums would have to be paid. There being no specific mode provided for the payment of said premiums, same would have to be paid out of the General Fund of the County. See **Weaver v. Tidwell, 228 Ala. 167, 153 So. 218.**

The further question presents itself as to whether or not the fact that the insurance is on the employees of your road department authorizes the payment of said premium out of the Gasoline Fund or out of the Road and Bridge Fund. I am of the opinion that this inquiry should be answered in the negative. Such, in my opinion, would not be an expenditure for the maintenance, repair, or construction of roads and bridges in the county. The taking out of such insurance is a mere gratuity and in no wise contributes to the maintenance, repair, or construction of its roads and bridges. I make this statement for the reason that the county could not be held liable in tort for any injuries to its employees when engaged in such work. **Quarterly Report of the Attorney General, Vol. 5, page 107.**

The premises considered, it follows that your first and second inquiries should be answered in the negative and that payment of the premium on the Workman's Compensation Insurance, if properly taken out, should be paid out of the General Fund of the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Montgomery, Ala.

Taxation — Municipality cannot share special county road tax, Constitution Section 215. Sections 1807, 2150 and 6774, Code of Alabama, 1923.

(1) Court of County Commissioners or other governing body is not lawfully authorized to pay municipality any portion of special road and bridge tax levied pursuant to subdivision (a) of Section 215 of the Constitution.

(2) If county has paid municipality any portion of special road and bridge tax levied pursuant to subdivision (a) of Section 215 of the Constitution, the amount thereof may be recovered within the time and in the manner provided by law.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Please refer to Section 215 of the Constitution, Section 2150, Code of 1923, any other Section of the Code or subsequent legislation relative to cities participating in taxes levied by Counties and 190 Alabama Reports, page 366, and advise me as follows:

"1. Would cities be entitled to any part of the two and one-half (2½) Mills levied as above?

"2. If a county has paid a part of such tax to a city and same should not have been paid, could same be recovered from such city?"

Answering the above inquiry, it is my opinion that the Court of County Commissioners or other county governing body is not lawfully authorized to pay any municipality within the county any portion of the special road and bridge tax levied pursuant to subdivision (a) of Section 215 of the Constitution, and that if such payment has been made, recovery of the amount so paid, may be had by appropriate action brought within the time required by law.

There are apparently three conflicting sections appearing in the 1923 Code of Alabama. I quote each section as follows:

"Section 1807. Road and bridge tax for county apportioned to city.— In any county where a property tax is assessed and collected by the county authorities for the construction or maintenance of public roads and bridges in the county, the board of revenue or court of county commissioners shall each year cause to be drawn a proper warrant payable to each city in such county having within its corporate limits territory taken in under the provisions of this article, such warrant to be for an amount equal to one-half of the road and bridge tax paid to the county on property within the corporate limits of such city. The council or governing body of such city shall use the money so paid to it by the board of revenue or court of county commissioners in keeping up and maintaining the public roads, streets, highways, and bridges, and in opening new roads, streets, highways, and constructing new bridges in the territory brought within the corporate limits of the city under the provisions of this article, the surplus of such funds, if any, to be

used in keeping up and maintaining streets, highways, and bridges, in any other part of the city that the board or governing body of the city may direct."

"Section 2150. Taxes; special road or bridge; one-half to municipality.—Courts of county commissioners and boards of revenue of the county where there is levied a special road and bridge tax, or either, shall pay over, each year, to each municipality therein, one-half of the money collected on such road and bridge tax, or either, on the property located in such municipality; such sums, when paid over to the municipality, shall be used exclusively for the purpose of maintaining the streets and bridges in the corporate limits of such municipality. Any money derived from a levy of a special bridge tax not expended by the municipality in maintaining the bridges within its corporate limits, in any year, shall be returned to the board of revenue or court of county commissioners, and credited to the county bridge fund for the purpose of maintaining bridges of the county, outside the corporate limits of such municipality."

"Section 6774. One-half road tax collected in municipalities to be paid to city.—The courts of county commissioners and boards of revenue, where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads and highways of any description in the county **except the special tax authorized by subdivision (a) of section 215 of the Constitution**, shall pay over each year to each municipality therein one-half of the money collected on such road tax on the property located in such municipality." (Emphasis ours).

It is not pertinent to this opinion for me to decide which one of the aforementioned code sections is now in effect because the county commissioners are not lawfully authorized by either code section to pay to a municipality within the county any portion of the special two and one-half (2½) mill tax levied pursuant to subdivision (a) of Section 215 of the Constitution of Alabama.

With reference to the authority of the first two aforementioned code sections, the Supreme Court of Alabama, in the case of *County of Montgomery v. City of Montgomery*, 190 Ala. 366, 67 So. 311, held that the legislature of Alabama is without authority to apply the tax, since the Constitution commands that funds so garnered shall be applied to public county roads, not to urban ways, I quote from the opinion as follows:

"(1) In the several decisions it has been decided here, after repeated full consideration of the question, that the application of a special road tax, levied and collected within the purview of section 215 of the Constitution of 1901, cannot be controlled by legislative enactment, since the Constitution commands that funds so garnered shall be applied to public county roads, not to urban ways.—*City of Tuscaloosa v. Court of County Commissioners of Tuscaloosa*, 173 Ala. 724, 54 South. 763 (a ruling based on opinion in *Board of Review v. State ex Rel. City of Birmingham*, 172 Ala. 138, 153-155, 5 South. 757); *Pike County v. City of Troy*, 173 Ala. 442, 56 South. 131, 274; *Commissioners' Court of Tuscaloosa County v. State ex rel. City of Tuscaloosa*, 180 Ala. 479, 61 South. 431. It follows, from the doctrine of these decisions, that section 1335 of the Code of 1907 (as readopted by the act of August 26, 1909, Acts

Sp. Sess. 1900, p. 174), which purports to alone deal with a special road and bridge tax, was and is constitutionally invalid.—Constitution 1901, Section 215, Div. (a).”

Section 6774, supra, specifically excludes any attempt on the part of the legislature to apply the tax levied pursuant to subdivision (a), Section 215 of the Constitution.

The Commissioners’ Court, in making application of the special tax in the manner indicated in your letter or inquiry, disobeyed the Supreme Court construction of legislative authority as set forth in Sections 1807 and 2150, and also disobeyed the plain and unambiguous terms of Section 6774. The payment to the municipality was therefore unlawful and without authority of law.

I premit any discussion as to the right of the county commissioners to pay to the municipality any portion of the general tax of five mills which may be levied pursuant to Section 215 of the Constitution, for road and bridge purposes. This question is not presented for determination.

The county may recover by appropriate action within the time required by law the money which was unlawfully paid to the municipality. **Mobile County v. Williams**, Judge, 180 Ala. 639, from which I quote paragraph 5, page 648, as follows:

“5. There appears to be no doubt the proposition, so far as the laws of Alabama are concerned, that when a public officer collects money from a county, as fees or compensation for services rendered by him, and to which fees or compensation he is not legally entitled, such county can maintain a suit for the recovery of the money so illegally obtained by him and recover the same. We can properly quote as applicable to the facts of the present case the following from the Supreme Court of Indiana: ‘The rule preventing the recovery of money voluntarily paid has no application under the facts in this case. As charged in the complaint, the claims were allowed and the money paid, without any legal authority for so doing. In view of the alleged facts, those claims were not only allowed in violation of law, but they were presented by the appellee, and the money of the county unlawfully received by him, and he is chargeable with knowledge of the illegal acts. It was no payment by the county.’

“The latter, as the principal, had no part in the payment. It could not, as a public corporation, be held to the consent to the payment of, or expenditures of, the public money in defiance of law. Awarding to the appellee this money, under the alleged facts, was in a legal sense equivalent, to an unlawful appropriation of the county’s money to his own use by the aid of its board of commissioners. The allowance and payment of the money being unlawful, the commissioners did not act within the scope of their authority and therefore did not bind the county.’ **Commissioners v. Heaston**, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192; **Board v. Ellis**, 59, N. Y. 620, **Lee v. Board, etc.**, 124 Ind. 214, 24 N. E. 986; **McElrath v. United States**, 12 Ct. Cl. 201, **American S. Co. v. Young**, 39 Pa. 186, 33 Am. Rep. 748; **Dew. v. Parsons**, 2B. & Ald. 562; **Stut v. Williams**, 8 Exch. 625; **Fire Ins. Co. v. Britton**, 8 Bosw. (N. Y.) 148; **Ogden v. Maxwell**, 8 Blatchf. 319, Fed. Cas. No. 10, 458; **Comer v. Board of Com’rs of Morgan County**, 32 Ind. App. 477, 70

N. E. 179; *State ex rel. Board of Com'rs of Tippecanoe County v. Flynn*, 161 Ind. 554, 69 N. E. 159."

The claim of the county must be properly presented to the municipality with the time required by law. *Montgomery County v. City of Montgomery*, 195 Ala. p. 197.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 23, 1937.

Hon. T. B. Bennett,
Tax Collector,
Choctaw County,
Butler, Alabama.

Tax Assessors & Tax Collectors—

Commissions of Tax Assessors paid out of first monies collected by Tax Collectors (a) Amount of Homestead Exemptions for tax year 1936-37 should be estimated by Tax Collector and deducted in estimating commissioners due to be paid Tax Assessor out of First monies collected. (b) When the amount of Homestead Exemption has been determined exactly, the matter can be definitely adjusted. (c) Commissions lost by exemptions of homestead paid out of Property Tax Relief Fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of August 2, 1937, which is as follows:

"Please tell me under the law: just how should I settle with the Tax Assessor on Commissions? The law says pay him out of the first monies collected. Since we can not tell the amount of the Homestead Exemptions; How can we arrive at the correct amount? I will thank you for any information that you can give."

The commissions of the Tax Assessor are paid out of the first monies collected by the Tax Collector. (See Section 22 et seq. of the Revenue Act of 1935).

The Homestead Exemption law is applicable to taxes assessed as of October 1, 1936, and payable as of October 1, 1937.—**Opinion Of the Justice (MS)**. When these assessments were made the Homestead Exemptions were not taken into consideration in most instances. Therefore, it became necessary to file said exemptions subsequently. It will probably be March, 1938, before the amount of Homestead Exemption can be determined finally.

The commissions of the Tax Assessors and Tax Collectors lost by the exemption of homesteads are payable out of the Property Tax Relief Fund, (Acts 1936-37, page 142). The Tax Assessor would, therefore, not be paid commissions on property exempt as homesteads by the Tax Collector out of the first monies collected by him.

In view of the above, the question presents itself as to the proper method of payment of the Tax Assessor's commissions by the Tax Collector out of the first monies collected. The only practical method to follow would be for the Tax Collector to estimate the amount of Homestead Exemptions and deduct same from the commission due otherwise to the Tax Assessor. In other words, the Tax Collector should deduct the estimated amount of commissions on Homestead Exemptions from the total amount of commissions which would otherwise be due the Tax Assessor, and pay to the Tax Assessor the proper commission on the difference out of the first monies collected. When the total amount of the Homestead Exemptions have been determined finally, the matter can be adjusted accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 24, 1937.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Act No. 157, General Acts, 1936-1937, page 179, approved March 4, 1937, and effective July 1, 1937 — Said Act provides that per diem and mileage of members of county governing bodies, while engaged in supervising highway construction and maintenance, shall be paid out of the Gasoline Tax Fund.

Opinion by the Attorney General.

Dear Sir:

I have your letter which follows:

"I would like your opinion as to whether, under House Bill 157, Senate 83, recently approved and to become effective July 1, 1937, the per diem and mileage of county commissioners may be paid from the gasoline tax fund."

The Act to which you refer in your letter of inquiry is Act No. 157, General Acts 1936-1937, at page 179, approved March 4, 1937 and effective July 1, 1937. This act reads as follows:

"Section 1. The revenue, less the cost of collection, obtained from taxes on lubricating oil, gasoline, naptha, and other liquid motor fuels or

any device or substitute therefor, commonly used in internal combustion engines as is provided for in Schedule 156.1 of House Bill 324, approved July 10, 1935, shall not be used for any purposes other than for the construction, improvement, and maintenance and supervision of highways and bridges and streets, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes. The payment of the per diem and mileage of members of County governing bodies when engaged in supervising the construction, improvement and maintenance of highways, bridges and streets shall be construed as supervision under the provision of this Act.

"Section 2. All laws and parts of laws, general, local and private, in conflict herewith are hereby repealed.

"Section 3. This Act shall go into effect July 1, 1937.

"Approved March 4, 1937."

In my opinion, this act provides that the per diem and mileage of the members of county governing bodies, while engaged in supervising highway construction and maintenance, not only may, but shall, be paid out of the Gasoline Tax fund, from and after its effective date.

As you know, the Supreme Court of Alabama speaking through Mr. Chief Justice Anderson, decided in the case of *Weaver v. Tidwell*, 228 Ala. 169, that the per diem and mileage of members of a county governing body could not be paid out of the Gasoline Tax even while they were engaged in the construction and maintenance of roads. The decision in that case, however, was based on the fact that Section 6771 of the Code of Alabama, 1923, as subsequently amended, which is the section providing for the compensation of members of county governing bodies, provides that they shall be paid out of the county treasury, and the Supreme Court held in that case that "county treasury" meant the general fund of the county. The decision was not rested on a finding that the payment of per diem and mileage of members of county governing bodies while engaged in supervising highway construction and maintenance, out of the Gasoline Tax fund, amounted to a diversion of that fund to a purpose other than those for which it was appropriated, namely, road construction and maintenance. That question was not dealt with in the opinion of the Supreme Court.

Act No. 157, *supra*, expressly provides that the payment of the per diem and mileage of members of county governing bodies when engaged in supervising highway construction and maintenance shall be construed as supervision, and supervision of highways and bridges and streets is one of the purposes to which the said Act restricts the use of the Gasoline Tax fund. The Gasoline Tax fund, and not the general fund of the county, is the fund primarily liable for the payment of expenses incurred by the county in highway construction and maintenance. It was for this general purpose that this tax was levied and to which its proceeds are appropriated. As above, stated, this Act restricts the use of these funds to this general purpose.

Construing Act No. 157 in the light of the purpose for which the Gasoline Tax was levied and to which the proceeds from said tax are appropriated and also restricted or limited, and the decision of the Supreme Court in the case of *Weaver v. Tidwell*, *supra*, it is obvious that the purpose of the

provisions of the said Act, to the effect that the payment of the per diem and mileage of members of county governing bodies when engaged in supervising highway construction and maintenance should be construed as supervision, was to remedy the situation resulting from the decision of the Supreme Court in the *Weaver v. Tidwell* case — that is, to relieve the general fund of this burden which it was required to bear as a result of the decision in that case. There seems to be no logical reason why the payment of the per diem and mileage of members of county governing bodies, while they are engaged in supervising highway construction and maintenance, should not be paid from the Gasoline Tax fund, which is set up for the express purpose of paying the expenses incurred in the construction and maintenance of highways. At the same time, there seems to be ample reason why the general fund, with all of the many claims against it, should be relieved of this burden, especially since there is a special fund set up for the general purpose of paying the expenses incurred in the construction and maintenance of highways. Evidently, the legislature deemed it advisable that this should be done. In my opinion, such was the reason for the provisions of this act in regard to the payment of per diem and mileage of the members of county governing bodies when engaged in supervising highway construction and maintenance. Therefore, it is my opinion that the word "shall" as used in the said Act is mandatory, and that from and after the effective date of this Act the per diem and mileage of members of county governing bodies, when engaged in the supervising of construction and maintenance of highways, not only may, but shall be paid out of the Gasoline Tax fund.

Of course, county governing bodies still have the right to appropriate money from the general fund to be used for highway construction and maintenance purposes, including the payment of the per diem and mileage of the members of county governing bodies while engaged in supervising highway construction and maintenance, after all involuntary obligations against the general fund (that is, all obligations against the county, the payment of which out of the general fund is made mandatory by statute) have been met. But this can only be done, when there is a surplus in the general fund after all involuntary obligations against said fund have been met. See *Rhodes v. Marengo County Bank*, 205 Ala. 667; Opinion of the Attorney General to Hon. L. H. Reynolds, Judge of Probate, Chilton County, Clanton, Alabama, under date of Oct. 15, 1931, Office Edition 6, page 262. This opinion is not to be construed as holding that the county governing bodies do not still have this authority to so transfer monies in the general fund for the payment of the per diem and mileage of members of county governing bodies while they are engaged in supervising highway construction and maintenance, when a surplus exists in the general fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 24, 1937.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

1. Clerk not entitled to costs on preliminary investigation under said act where there is an acquittal or nol pros.

2. Insofar as said act is retroactive, it violates Section 100 and Section 68 of the Constitution of 1901 and is unconstitutional and void.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please refer to Act No. 225 Merrill—approved March 2, 1937.

"1. Under this Act would the Clerk be entitled to Fine and Forfeiture claim for \$2.00 where there is an acquittal or nol pros in misdemeanor cases in the County Court?

"2. If entitled to Fine and Forfeiture claim of \$2.00, does this act ratify claims heretofore issued not to exceed \$2.00?"

The act referred to appears in the printed Acts of the Extra Session of 1936-37 at page 268. This act provides:

"Section One: In all criminal cases where the Judge of the County Court shall sit as committing Magistrate, the Clerk of the County Court shall act as Clerk to such committing Magistrate in said proceedings, **and when the defendant is subsequently convicted** and sentenced to the penitentiary or to hard labor, the Clerk of the County Court shall be entitled to a fee of Two Dollars to be taxed in the bill of costs in the same manner and paid out of the same fund, at the same time and in the same way as is provided by law for the payment of other items of costs incurred by the State."

You will note that under the language of this section the right of the Clerk to costs is conditioned on the defendant being subsequently convicted. It is therefore my opinion that the Clerk is entitled to no fees under said act where there is an acquittal or nol pros.

As to your second question, my answer is also in the negative. Section 2 of said Act provides as follows:

"Section Two: All payments not exceeding the sum of Two Dollars in each case heretofore collected by the Clerk of the County Court in such proceedings are hereby ratified."

This section attempts to make a charge that was illegal at the time it was made a legal charge by a subsequent act of the Legislature. As to any costs collected by the Clerk of the County Court before the date of such act, such collections were without authority and resulted in all obligation or liability of the Clerk to the State or county. Under the provisions of Section 100 of the Constitution of Alabama of 1901 the Legislature may not by sub-

sequent act release, extinguish or remit any obligation or liability due and owing to the State, county or other political subdivision thereof. It also appears that said section is in violation of the provisions of Section 68 of the Constitution of Alabama of 1901 insofar as it seeks to grant compensation fees or allowances to a public officer after the service has been rendered. In my opinion, therefore, Section 2 of the said act is unconstitutional and void.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. A. M. McConnell,
Judge of Probate,
Limestone County,
Athens, Alabama.

Filing Tax—Schedule 94, General Acts of 1935, page 474.

Deed given by mortgagor to mortgage owner in lieu of mortgage foreclosure with right of redemption reserved for statutory period is not subject to filing tax, provided the original mortgage is filed and lawful filing tax was paid thereon.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Opinion of the Attorney General dated Jan. 13, 1932, pages 656-657, 1930-1932 opinions, holds that an instrument with right of redemption, executed in lieu of foreclosure, etc., is subject to Mortgage Tax and not Deed Tax.

"Where the original mortgage was filed and Mortgage Filing Tax paid, would the "instrument" when being filed be subject to Mtg. Filing Tax again?"

I infer from your letter that a mortgagor, to avoid expense incident to the foreclosure of a lawfully recorded mortgage upon which the filing tax had been paid, executed and delivered a deed to the owner of the mortgage, in lieu of mortgage foreclosure, reserving the right of redemption by appropriate provision in the deed. I infer, too, that no consideration passed between the parties to the transaction other than that which would have passed had the owner of the mortgage proceeded to foreclose and to purchase the property at the foreclosure sale. I assume that the grantee did not pay the grantor any money or other valuable consideration for making the deed.

On the above assumption of facts, it is my opinion that no filing tax should be collected on the instrument which is offered for record.

The mortgage itself conveys legal title to the owner of the mortgage. If the mortgage had been foreclosed, a foreclosure deed would not be necessary to vest legal title to the property in the owner of the mortgage who purchased at the foreclosure sale. Foreclosure of the mortgage does nothing more than cut off the equity of redemption in the mortgagors. The equity of redemption is that right reserved by the mortgagors to pay off the debt and by such payment divest legal title out of the owner of the mortgage. Without the aid of a statute in Alabama, the mortgagors would not, after mortgage foreclosure, have any right to redeem the property. A mortgage foreclosure deed given to the owner of the mortgage who was the purchaser at the mortgage foreclosure sale, performed no office other than to serve as a permanent memorial of the foreclosure sale.

The foregoing principle was enunciated in the case of **Jackson et al. v. Tribble**, 156 Ala. 489, the court saying in part as follows:

"In this case the proof shows that the mortgage was foreclosed by a sale under the power, and that the mortgagee became the purchaser and made a deed to himself. There is no proof, aliunde the recitals in the deed, that the terms described by the mortgage were complied with; but the recitals of the deed show compliance and they are prima facie evidence of the facts stated therein, as against the mortgagor. * * * But, suppose there has been no deed executed to the mortgagee, who purchased at the sale; then, according to the common law, the legal title was already in him and without a deed he might maintain ejectment. 2 Jones on Mortgages, paragraph 166."

In the foregoing case, the court further said:

"Furthermore, the sale cuts off the equity of redemption as effectually without as with a deed and left the mortgagor only the statutory right of redemption which might be exercised within two years from the sale. * * * On these considerations the relation of mortgagor and mortgagee, was severed between the parties, and the plaintiff stands, in this suit, not in the attitude of a mortgage, but of a purchaser after the foreclosure of sale."

Reaffirming the foregoing principle, the court, in the case of **Ritter v. Mosley**, 226 Ala. 653, said as follows:

"Where the mortgagee exercises a power of sale and becomes the purchaser, the authorities all agree that the execution of a deed is not essential to vest legal title, for the simple reason that the mortgagee holds the legal title under the mortgage. **Jackson v. Tribble**, 156 Ala. 480."

It is my opinion that the Legislature of Alabama has not imposed a filing tax for the recordation of an instrument which merely performs the office of memorializing the procedure of foreclosure. This office previously held, in an opinion rendered to the Judge of Probate of Lee County, Opelika,

Alabama, Biennial Report of the Attorney General, 1928-1930, page 952, that a deed given in lieu of a mortgage foreclosure for a consideration that was nominal, was not subject to a deed filing tax, but conditioned upon the Probate Judge being satisfied that there was no excess in the value of the real estate over the amount of the mortgage, and that the deed was given for the purpose of perfecting the written title. Opinion of the Attorney General, Book 17, p. 74, (Office Edition). Report of the Attorney General, 1926-1928, page 680-682. This office also held in another opinion, that a mortgage foreclosure deed to the mortgagee or his transferee was merely a memorandum of sale and was not subject to a filing tax. Vol. 14, p. 193.

It would be your duty to ascertain if the deed offered for record was given strictly in lieu of mortgage foreclosure with right of redemption reserved for the lawful statutory period of time, and further, if the grantee in the deed was the owner of the mortgage at the time of the execution and delivery of the deed to him. It would also be your duty to ascertain if any consideration in excess of the mortgage debt existing at the time of the execution and delivery of the deed was paid directly or indirectly, by the grantee to the grantor for the execution and delivery of the deed. If the instrument offered for record failed to contain any recitation that it is given in lieu of mortgage foreclosure with full right of redemption reserved for the statutory period, then in my judgment you would be required under the law to rule that the deed or instrument is subject to the filing tax, for the reason that the transaction amounts to a **sale of the land or property conveyed as distinguished from a mere surrender of the equity of redemption**, as would be the case in the latter instance if the instrument were a mere deed given in lieu of mortgage foreclosure.

It would be your duty as Probate Judge to ascertain the facts and determine whether or not the transaction amounts to a **sale** of the land to the owner of the mortgage, or whether it is nothing more than a **surrender** of the mortgagor's equitable right of redemption which could have been compelled by lawful mortgage foreclosure sale. I emphasize the importance of your determining if the grantee in the deed offered for record was the **owner** of the mortgage at the time of the **execution and delivery** of the deed. Also, you are not bound by a recital in the instrument that it is given in lieu of mortgage foreclosure with right of redemption reserved for the statutory period, but you may look outside of the deed to ascertain as to the truth of these recitals, and such investigation may be made for the purpose of determining whether or not the transaction amounts to a **sale** of the property with the right of repurchase, in which event, it would be your duty to collect a filing tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. O. S. Nichols,
Tax Assessor, Perry County,
Marion, Alabama.

1. Owner of a house and lot occupied by a family as homestead, the assessed value of which is \$1500.00, who subsequently builds an

additional house on the same lot, valued at \$1500.00, is entitled to homestead exemption on the first \$2000.00 of the assessed value, since property is impressed with the character of homestead before the second house was built, notwithstanding fact said second house rented to tenant.

2. One owning 160 acres of land, on which is situated a dwelling and several tenant houses, the assessed value of which is \$1680.00, is entitled to homestead exemption on the entire property.

3. One entitled to homestead exemption where property bona fide homestead, notwithstanding the fact that he or she is out of the state visiting or traveling the major portion of the year. The intent to make property permanent home would govern in such cases and the fact person so situated was a widow would make no difference.

Opinion by Assistant Attorney General King.

Dear Sir:

I have your request for opinion, which reads as follows:

"1st. Say Mr. Jones owns his house and lot in Town, and the value on Mr. Jones house and lot is assessed on the tax books for \$3,000 which of course is the 60% value, now in this case we all know that this is his homestead, because he lives in the house, so under the homestead law as passed, Mr. Jones is entitled to exemption for the States part of taxes which is 6½ Mills on the value of \$2000, and subject to tax on the remaining \$1,000 value for the State. We of course know that Mr. Jones is subject to the County's part of tax on the entire value of \$3,000.

"2. Say that Mr. Jones owns this same lot above and his lot mentioned is valued at \$500 and his dwelling is valued at \$1000 making his dwelling and lot valued at \$1,500 as the 60% value, and on this same lot we say that he has built a house valued at \$1,500 that he rents, now his entire assessment is \$3,000 as above, but his dwelling and lot is only valued for \$1,500. Now the question before us is, Is Mr. Jones entitled to the full \$2,000 exemption from his total value of \$3,000 or is he under the law just entitled to exemption for the value of his lot and dwelling which shows to be valued at \$1,500 or would he be entitled to exemption of \$2,000 if it took the value of the house rented to allow the full \$2,000 exemption.

"3. Does a taxpayer necessarily have to be living in the house on the property sought to be exempted for his homestead, before he can claim exemption for homestead.

"4. Suppose Mr. Jones owns 160 acres of land for which the law allows 160 acres to be claimed as his homestead, we will say that this land is valued at \$3.00 per acre or \$480 and his dwelling that he lives in is valued at \$600 but there are we will say two tenant houses on this same 160 acres of land valued at \$300 each or \$600 for the two, making the total value of the 160 acres, his dwelling, and tenant houses \$1680, now is Mr. Jones entitled to the full \$1680 value which covers the 160 acres and

all three houses, or is he just entitled to exemption on the value of the 160 acres and his dwelling which is \$1,080 and subject to the States tax on the value of the tenant houses.

"5. Suppose Mr. Jones owns 160 acres of land, but we say forty acres that he lives on where his dwelling is does not join or touch the remaining 120 acres, but there is a forty owned by another person that separates Mr. Jones forty from the remaining 120 acres, would Mr. Jones be entitled to exemption on the value of the entire 160 acres as his homestead or just entitled to the value of the forty acres where the house is located, or is he entitled to exemption on 160 acres regardless of whether it touches and joins.

"6. What about property owned jointly, say two brothers own a farm of 160 acres and only one of the brothers lives on the farm, are they entitled to one exemption of the full amount of \$2,000 in the event the property is valued for \$5,000.

"7. Suppose we have an assessment as follows, John Smith, Executor for Estate of Tom Smith, for which this is a rather large estate containing several thousand acres of farm lands, and several dwelling houses occupied by the widow, and children of the deceased, there are several married sons that have their homes on the place, as well as the dwelling that their Mother and other children occupy. This property is all owned by Estate of Tom Smith not ever being divided, what amount if they would be exempted for claiming the homestead exemption, you would just allow the \$2,000 full value for homestead I would presume and the remainder of course would be liable for taxes.

"8. Suppose Mr. Jones is a bachelor, never married and never will, but he owns a farm for which he has owned and lived on for 40 years, under the law is he entitled to a homestead exemption as well as if he were married and had a family, or is the law going to penalize him.

"9. What about a widow lady that owns her home in town, but most of the time she is out of the County, and out of the State visiting and traveling, but she lives in this house whatever time that she is here during the year, and she gives a young married couple rooms in her house just to have someone there to take care of the property when she is not there. This is her homestead and would be entitled to exemptions as though she was there during the entire year, is that not correct."

My answer to your second question is that the owner of a house and lot occupied by a family as a homestead, the assessed value of which is \$1500.00, who builds an additional house on the same lot, the assessed value being \$1500.00 is entitled to homestead exemption on the first \$2000.00 of the assessed value. Property was impressed with character of a homestead before the second house was built, notwithstanding the fact that said second house is rented to a tenant.

The answer to your fourth inquiry is that a person who owns 160 acres of land, on which is situated a dwelling, where his family resides together, and several tenant houses, occupied by tenants, the assessed value of the 160 acres being \$1680.00, is entitled to his homestead exemption on the entire property, and would likewise be true so long as the assessed value did not exceed \$2000.00.

Answering your ninth question, you are advised that one is entitled to a homestead exemption in property which is his or her bona fide homestead, notwithstanding the fact that he or she is out of the state visiting or traveling, the major part of each year. The intent to make the property the permanent home would govern in such cases, and the fact that the person so situated happens to be a widow would make no difference.

Question 1 propounded in your inquiry has been decided by an opinion of this office dated August 14, 1937 to Mr. W. B. Thrash. This opinion appears on page 49 of the compiled opinions recently sent you. Question 3 is answered by an opinion to Mr. Roy Johnson, dated August 10, 1937, which appears on page 18 of the compiled opinions forwarded to you.

Referring to Question 5, please see the opinion of this office to Mr. T. D. Woodham dated August 10, 1937, appearing on page 22 of the compiled opinions. I refer you to syllabi (b) and (c) thereof. Also see the opinion to Mr. Woodham, syllabus (e) for an answer to Question 6 which you propound. See Syllabus (d), opinion to Mr. Woodham, for an answer to Question 7 and for an answer to Question 8, see syllabus (k) of the same opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. Theodore Hurt, Clerk and Register,
Circuit Clerk of Perry County,
Marion, Alabama.

Justice of the peace does not have final jurisdiction over violations of the Uniform Firearms Act.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of August 16, 1937, which is as follows:

"Please advise me if a Justice of the Peace has final jurisdiction for violations of the Uniform Firearms Act."

Act No. 82, General Acts 1936, page 51, as amended by Act No. 190, General Acts 1936-37, page 223, known as the Uniform Firearms Act, does not confer final jurisdiction upon justices of the peace for violations of said Act. Neither does Section 3847, Code of Alabama, 1923, which deals in general with the final jurisdiction of justice of the peace courts, include violations of the Uniform Firearms Act among other cases specifically mentioned. I am not aware of any other statute which confers such authority on justice courts.

Criminal jurisdiction of justices of the peace and similar officers is wholly the creature of statutes which are strictly construed. Jurisdiction as-

sumed must be conferred clearly by statutes, and will not be extended by inference. 16 C. J. page 154.

Therefore, I am of the opinion that a justice of the peace does not have final jurisdiction over violations of the Uniform Firearms Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. Fred H. McDuff,
Sheriff, Jefferson County,
Birmingham, Alabama.

1. Sheriff may use reasonable force in evicting tenants under order of restoration, pursuant to judgment in suit of unlawful detainer.

2. If necessary, sheriff may break an outer door to a dwelling house in carrying out the order of the court to restore the plaintiff in a suit of unlawful detainer to possession of the premises.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Please advise me whether or not the Sheriff has power, authority and duty to break an outer door to a dwelling house for the purpose of evicting the tenants where a judgment has been rendered in Inferior Court in favor of the landlord for possession of his premises in a suit of unlawful detainer."

Section 8010 of the Code of Alabama of 1923 provides:

"8010. If plaintiff succeeds, writ of restitution issued; costs.—If the justice determines in favor of the plaintiff, he must record the decision, and render judgment with costs, upon which he must issue a writ of execution, commanding the sheriff to restore the plaintiff to the possession or place him in possession of his lands and tenements according to complaint, and to levy on and sell a sufficiency of the defendant's goods and chattels, lands and tenements, to satisfy the costs of the proceedings. Successive writs may issue at any time when necessary to eject defendant or collect costs and damages, and a defendant who refuses to obey the mandate of the writ as to the possession of the property, or who enters upon the premises without just cause or legal

excuse after being ejected, shall be guilty of resisting officer and contempt of court, and shall be punished and fined accordingly, in the discretion of the court issuing the process."

While writ is described in this statute as a writ of execution, in the syllabus to the statute it is described as "a writ of restitution". It is not an ordinary writ of execution commanding the sheriff to levy on goods, but contains also an order to the sheriff "to restore the plaintiff to the possession or place him in possession of his lands and tenements according to complaint." In the case of **Lankford v. Green**, 62 Ala. 314 at 319 the Supreme Court considered the effect of such a writ and the proper execution thereof. The Supreme Court there said:

"In the execution of a writ of possession, it is the duty of the sheriff to place the plaintiff in the actual and peaceable possession of the premises recovered. **If the tenant in possession does not yield peaceably and quietly, he must be removed, and until he is removed, the writ is not executed.** 2 Tidd's Pr. 1246-7; Freeman on Executions Sec. 474; Farnsworth v. Fowler, 1 Swan 1, 55 Am. Dec. 718."

While the general rule is that a sheriff may not break into a dwelling while executing civil process, this process, as you will see, is different from the ordinary civil process in that the sheriff is under the duty to remove the tenant, and until the tenant is removed the writ is not executed.

This exact question was presented to the Supreme Court of Connecticut in the case of **Fry v. Taylor**, 106 Conn. 387, 108 Atl. 138. In that case the court had rendered a judgment in favor of the landlord and pursuant to the judgment had issued a writ requiring the sheriff to dispossess the tenant. In order to dispossess the tenant it was necessary for the sheriff to force open a locked door. The court held that the tenant, in seeking to maintain possession in defiance of the court's judgment, was himself a wrongdoer and that since the sheriff used no more force than was reasonably necessary, the sheriff was not liable on damages and forcing into the dwelling.

It is therefore my opinion that where a judgment has been rendered by a proper court in a suit of unlawful detainer and a writ has been issued commanding the sheriff to restore the plaintiff to possession, that the sheriff may use such reasonable force as is necessary to remove the tenant. If the tenant refuses to grant admission to the sheriff but seeks to maintain possession in defiance of the court's judgment and by locking the doors to such dwelling house, in my opinion you have the power and authority to force an entrance, using no more force than is reasonably necessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Filing Tax—Deed Tax.

(a) Deed tax on property located partly in the State of Alabama, and partly in another state, to be determined by the State Tax Commission upon petition and hearing of evidence.

(b) Proponent of deed for record has privilege of paying entire deed tax on the entire amount recited as the true valuation of the property or upon the amount found to be the true valuation of the property by the Probate Judge and of filing petition for a determination of the value of the property located in Alabama, by the State Tax Commission within thirty days after offering said instrument for record.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"I have a request to file for record a deed expressing consideration of \$150,000.00 which conveys real estate in Colbert County, Alabama and real estate in the state of Mississippi, the total consideration for the property conveyed in both states being \$150,000.00. Should I charge a deed filing tax on the entire valuation of \$150,000.00 or only on that part in the State of Alabama?"

In reply I wish to advise you that it is my opinion that the filing tax is due upon the value of that portion of the realty which is located in the State of Alabama as set out in your statement of facts.

The person offering the deed for record has a two-fold option, provided for in the Revenue laws of 1935, Schedule 94, subsection (h) of Section 348, Article XIII, Chapter I, as follows:

"Sub-section (h). If any part of the property embraced or described in any instrument which is required under this section to pay a record privilege tax is located without this State, the indebtedness upon which the tax shall be paid for the privilege of recording such instrument shall be that proportion of the indebtedness secured by the instrument which the value of the property located in this State bears to the whole property described in said instrument. The State Tax Commission may ascertain the value of the whole property, and of that part of it which is located within this State, for the purpose of ascertaining the amount of the indebtedness upon which said tax shall be paid. And the value of that part of the property located within this State and the amount of the indebtedness upon which such tax shall be paid shall be ascertained in

the following manner; First, the owner of any such instrument, or his agent, or attorney, may petition the State Tax Commission to ascertain the value of the whole property, and of that part of which is located within this State and the amount of the indebtedness upon which such tax shall be paid, and the State Tax Commission after hearing such evidence as may be offered or as may be before it; shall fix and determine the value of that part of the property located within this State and the amount of the indebtedness upon which the tax shall be paid and shall endorse its findings on such instrument and upon the presentation of said instrument, with such endorsements, to the Probate Judge of the County in which any part of the property is located, such instrument upon the payment of the tax upon the amount of such indebtedness as so ascertained by said State Tax Commission and of the recording fees of the Probate Judge; or, second, the owner of any such instrument, or his agent, or attorney, may have such instrument recorded by paying to the Probate Judge of the county in which the instrument is offered for record, the privilege tax on the entire amount of the indebtedness secured by such instrument, and may thereupon present his petition to the State Tax Commission within thirty days after such instrument is recorded, and it shall be the duty of said property and of that part of it located within this State, and to fix and determine the amount of the indebtedness upon which the tax shall be paid, and said Commission shall thereupon ascertain such valuation and fix and determine such indebtedness, and shall order the Judge of Probate to refund the excess of privilege tax collected by him and the Probate Judge shall comply with such order; and the tax paid upon the entire amount of such indebtedness shall be held by the Probate Judge until the State Tax Commission determines the amount of the indebtedness upon which such tax shall be paid."

You will note that I have set forth the provisions of the Revenue Act of 1935, Schedule 94, sub-section (h) of Section 348, Article 13, Chapter 1. You will further note that the second alternative provided by this Act is not entirely clear in its provisions. I call your particular attention to that part of its beginning, "and it shall be the duty of said property and of that part of it located within this State." Unless the entire Act is read this particular provision in the Acts of 1935 above quoted makes no sense whatsoever. In my judgment, however, it is necessary to read the entire Act in order to get the intention of the Legislature. The Supreme Court of Alabama and the Appellate Court of Alabama have held numerous times that the intention of the Legislature constitutes the law. I wish to refer you to the case of **Birmingham v. Southern Express Co.**, 164 Ala. 529, in which the court held "the intention of the lawmakers is the law." It is necessary to read the entire act in order to gather the intention of the Legislature and thereby determine what the law really is. **State ex rel City of Mobile v. Board of Revenue and Road Commissioners**, 80 So. 368, 202 Ala. 303, 59 C. J. p. 601, paragraph 160.

It has been held that a statute will not be held unconstitutional or void because of mere omission of details necessary to accomplish its evident purpose, if such details can be supplied by reasonable implication. **State ex rel Otto v. Kansas City**, 276 S. W. 389, 397, 310 Mo. 542. The fact that an act or a statute is in such form as to present difficulty in ascertaining its meaning will not within itself render the act or statute nugatory. 59 C. J., p. 607; **Pacific Coast Dairy v. San Francisco Police Court**, 298 Pac. 164; **Adams v. Green**, 206 S. W. 759, 182 Ky. 504; **Katzman v. Com.**, 130 S. W. 990, 140 Ky. 124, 140, Am. State Report 359, 30 L. R. A. (ns) 519.

The premises considered, it is my opinion that the entire act must be read and construed as a whole in order to properly ascertain the real meaning of the Legislature in this particular statute and, therefore, ascertain what the law really is on this particular subject. Upon such examination of the entire statute, the conclusions are inevitable that two alternatives are offered the taxpayer by this statute, viz., that the owner of any such instrument, or his agent or attorney, may petition the State Tax Commission to ascertain the value of the whole property, and of that part of it located within this State, and the amount of the indebtedness upon which such tax shall be paid and the State Tax Commission after hearing such evidence as may be before it; shall fix and determine the value of that part of the property located within this State, the amount of the indebtedness upon which tax shall be paid and shall endorse its findings on such instrument and upon the presentation of such instrument with such endorsement to the Probate Judge of the county in which any part of the property is located, such instrument, upon the payment of the tax upon the amount of such indebtedness as so ascertained by the said State Tax Commission and of the recording fees of the Judge of Probate, shall be recorded.

Secondly, the owner of any such instrument or his agent or attorney may have such instrument recorded by paying to the Probate Judge of the county in which the instrument is offered for record the privilege tax on the entire amount of the indebtedness secured by such instrument, and may thereupon present his petition to the states Tax Commission within thirty days after such instrument is recorded and it shall be the duty of the said State Tax Commission to determine the value of the said property or that part of it located within this State and to fix and determine the amount of the indebtedness upon which the tax shall be paid and shall order the Judge of Probate to refund the excess of privilege tax collected by him and the Probate Judge shall comply with such order; and the tax paid upon the entire amount of such indebtedness shall be paid by the Probate Judge until the State Tax Commission determines the amount of the indebtedness upon which such tax shall be paid.

I have examined the above quoted law through the journals of the House and the Senate and it is my judgment that the conclusions announced in this opinion are correct interpretations of the intention of the legislature and the law on this subject.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. Howard G. King,
Assistant Director,
Transportation Bureau,
Alabama Public Service Commission,
Montgomery, Alabama.

September 27, 1937.

1. Person, not regularly engaged in the transportation business but occasionally transporting property of others for hire, not a contract carrier as defined by such act.

2. Person transporting only property offered for sale, sold or to be sold by him, not a contract carrier as defined by said act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 11, 1937, in which you request my opinion as follows:

1. A party operates a cotton gin and owns a truck for his own use, 28 miles from the railroad and on a dirt road. Is he required to buy a carrier license to haul cotton to town for his customers when he has room for it?

2. The Security Warehouse Company of LaGrange, Georgia, owns a cotton warehouse and a cotton gin both of which serve the farms direct, handling the farmers' cotton. They also own trucks that are not for hire, but haul their own cotton and the cotton of their customers. They wish to serve their customers who live across the line in Alabama and wish to be advised as to the Alabama law applicable, and particularly as follows:

(a) A party owning a cotton gin and owning trucks wants to haul seed cotton from an Alabama farm to a Georgia cotton gin, the charge for hauling being added into the cost of ginning.

(b) A party owning a cotton warehouse and owning trucks wants to haul baled cotton from an Alabama farm, across to the line to a Georgia warehouse, to market the cotton and charge for the hauling in connection with the warehouse charges, but does not haul for the public.

(c) A party owning a truck in Georgia, having complied with all Georgia laws to haul cotton from farm to market, but not for hire in commerce, wants to haul seed cotton from Alabama farm to Georgia gin and charge for hauling.

Your first inquiry involves the liability for a carrier's license of one operating a cotton gin, owning a truck for his own use but hauling cotton for his customers when it is convenient to do so. Under the Contract Carrier Act of 1932, Acts of Extra Session, 1932, page 178, Section 1 (d), 3 and 4, it is provided:

"Contract carrier shall not be construed to mean or include (3) any person, firm, association or corporation who does not regularly engage in the transportation business but occasionally transports persons or the property of others for hire, or (4) any person, firm, association or corporation, when transporting only property offered for sale, sold or to be sold by him."

It appears from the facts set out in your inquiry that the person in question does not regularly engage in the business of furnishing transportation of persons or property for hire, but at most only occasionally transports the property of another. It also appears that probably this person would come under the exception set out in sub-section 4 cited above. In my opinion, therefore, such party is not required to buy a carrier's license.

2. Your second inquiry involves a resident of Georgia. I assume that your inquiry is only as to the construction of the Carrier Acts and you do not request information as to the regular motor vehicle licenses necessary. For your information, however, I call your attention to Schedule 158.15 of the Revenue Law of 1935, as amended by Acts of 1936, page 208, which regulates the motor vehicle license on non-residents used for commercial purposes. I call your attention to the opinion of this office under date of August 21, 1937, to Hon. Henry S. Long, construing this section.

I now proceed to consider the particular facts set out in your letter and whether under such facts the person in question is liable for mileage as a contract or common carrier.

(a) If such person does not regularly engage in the transportation business but merely transports property for hire occasionally, he would not be a contract or common carrier under the Motor Carrier Act of 1932. If such party regularly engages in the transportation business there would arise the further question of whether such party comes within the exception of section 1(d)—4. If the seed cotton transported is property offered for sale, sold or to be sold by the party owning the cotton gin, it would come within this exception and the person on question would not be a contract carrier, as defined by the act. If, on the other hand, such person regularly engages in the transportation of seed cotton for hire, which such cotton is not property offered for sale, sold or to be sold by him, in my opinion he would be a contract carrier and subject to all the provisions of the act.

(b) Your next inquiry is as to the liability of a party owning a cotton warehouse who hauls baled cotton from an Alabama farm to a Georgia warehouse to market the cotton, charging for such hauling in connection with the warehouse charges. It appears from the facts set out that such person transports only property offered for sale, sold, or to be sold by him, and, therefore, is not liable as a contract carrier.

(c) Your next inquiry is as to a party owning a truck in Georgia and desiring to haul seed cotton from Alabama farm to Georgia gin and charge for such hauling. The mere fact that such hauling is of seed cotton and that the only article transported is seed cotton does not constitute any exception to the definition of a contract or common carrier under the Motor Vehicle Act of 1932 above cited. If such party intends to engage regularly in the transportation business, transporting seed cotton for hire, he would be a contract carrier as defined by such Motor Vehicle and would be under all the duties as to permits, licenses and mileage tax, provided by said act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1937.

Hon. Simon Wampold,
Chief Clerk, Probate Court,
Montgomery County,
Montgomery, Alabama.

License—Motor Vehicles—Automobile designed for transporting freight and merchandise requires truck license tag. Automobile not designed for carrying freight or merchandise not liable for truck license.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 14, 1937, in which you request my opinion as follows:

"The License Inspector of this County has brought up a matter that we would like cleared before October 1. Cleaning concerns take automobile coaches and sedans and simply paint the rear side windows with a business sign, making no other changes in the car whatsoever, leaving the upholstery just as it is, and use these automobiles for purpose of collecting and delivering clothes for cleaning.

"It is the contention of the License Inspector that since the cars are used in this manner, they should have a truck tag instead of a regular automobile tag. This office has been selling private tags for these cars, as they are nothing more or less than private passenger cars, with the exception of the painted signs on the side windows, and of course, are used primarily for business.

"Will you be kind enough to clear this matter up promptly, as we begin selling automobile tags on October 1?"

In an opinion of this office reported in Quarterly Report 4, page 173, it was decided that a "sedan delivery" that is, a passenger automobile carrying a removable rear seat and equipment with a back door required a truck license. A motor truck is defined by Schedule 158(j) of the General Revenue Law of 1935 as:

"(j) 'Motor Truck': Any motor-propelled vehicle **designed for carrying freight or merchandise** or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks; but it shall not include self propelled vehicles equipped primarily for passenger transportation."

It would be a question of fact in each case as to whether the vehicle in question was designed for carrying freight or merchandise. If the automobile coach or sedan was so changed as to be designed for carrying freight or merchandise, in my opinion, it would require a truck license tag. If, however, such automobile coach or sedan is merely changed by painting the rear side windows with a business sign and nothing more, this would not, in my opinion, bring such automobile coach or sedan under the definition of

a motor truck as one designed for carrying freight or merchandise. If, therefore, such automobile coach or sedan is not so changed as to be designed for carrying freight or merchandise, it would not come within the definition of a motor truck, and, therefore, would not require a truck license tag.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1937.

Barber Commission of Jefferson County,
Jefferson County Courthouse,
Birmingham, Alabama.

Veteran's Exemption—Employer, Employee—Shine boy and lady manicurist to whom no compensation is paid, who practice their separate vocations within the barber shop, held not an employee within the meaning of the Veterans Exemption Act (General Acts of 1935, page 1057).

2. Unemployment Compensation—Shine boy and lady manicurist who practice their vocations in barber shop but render no services to the barber in return for the privilege of so practicing, held not an employee within the meaning of the Unemployment Compensation Law (Acts of 1935, page 950).

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"We have had several inquiries at this office as to who is exempt and who is not exempt from paying occupational license under the Disabled Veterans' Act, and we would like to know if a shine boy in a barber shop would be considered an employee where he receives no salary from the owner of the shop, but simply has the privilege of working in said shop, retaining all the money received by him for shines and tips.

"Under the Veterans' Act an employer is entitled to one employee. Would a negro shine boy be considered as a second employee?

"And does the same apply to a lady manicurist, who does not receive any salary from the owner of the shop, but retains all she takes in for her work and tips?

"We are anxious to get the above information so that we can answer these inquiries intelligently. We would also like to know if the manicur-

ist and shine boy come under the provisions of the Unemployment Compensation Act. Neither of them receives any salary, but are in fact working for themselves."

Your first inquiry involves the construction of Section 5 of the Veterans Exemption Act (Acts of 1935, page 1057), which provides as follows:

"Section 5. Any person who assists or serves such veterans in the conduct or carrying on of such veteran's business or occupation shall be deemed an employee, helper or apprentice, whether such assisting person be paid any compensation for his assistance or services or not. The term 'license tax' as used in this act shall be deemed to include any tax prescribed by a license tax schedule but not to exclude any license tax otherwise prescribed."

Under the provisions of this act, the term "employee" includes any person who assists or serves the veterans in the conduct or carrying on of the veteran's business or occupation. Under your first inquiry, the question arises as to whether a boy who shines shoes "assists or serves such veteran in the conduct or carrying on of such veterans' business or occupation", as a barber. The same question arises concerning the lady manicurist who practices her vocation in the barber's shop with the permission and approval of the barber veteran, who does not receive any salary from the owner of the shop but retains all she takes in from her work and tips.

Under the definition of employee in Section 5 of the Veterans Exemption Act, supra, the fact that compensation is not paid by the veteran is not determinative of the relationship of employer and employee. However, this fact, together with all of the facts as to the relationship between the shine boy and manicurist and the owner of the barber shop, are proper to be considered in determining whether or not such shine boy and manicurist "assist or serve such veteran in the conduct or carrying on of such veteran's business or occupation". In my opinion, the shine boy and manicurist are independent contractors engaged in performing service for their own benefit. Any services rendered in connection with the performance of the barber shop are merely incidental to the performance of their own service for their own benefit. The veteran's business or occupation is that of a barber, that is, to give shaves and hair cuts. It is from this occupation that he receives his income, and from the facts set out in your letter, he receives no income for the shines and manicures. Therefore, in my opinion, the shine boy and manicurist do not "assist or serve the veterans in the conduct or carrying on of the veteran's business or occupation." It follows, therefore, that the manicurist and shine boy are not employees of the veterans within the meaning of the act above quoted.

2. Coming to a consideration of the liability of the barber for contributions for the manicurist and shine boy under the Unemployment Compensation Law of Alabama, we are presented with an entirely different question. The terms "employee" and "employment" are defined by the Alabama Unemployment Compensation Law (Acts of 1935, page 952, Section 2, subsection (g) as follows.

"(g) 'Employment' means any employment in which all or the greater part of the person's work (within the continental United States) is or was customarily performed within this State, under any contract of hire, oral or written, express or implied, whether such person was hired

and paid directly by the employer or through any other person employed by the employer, provided the employer had actual or constructive knowledge of such contract. Such employment shall include the person's entire employment (in all states, including the District of Columbia). In the case of all other persons employed partly in this State and partly in other states, the commission is authorized, with the approval of the Governor, to enter into reciprocal arrangements with other states as to the extent the employment of such persons shall be included under this definition. * * *

Under this definition it must be determined whether the shine boy and lady manicurist inquired about perform any services under a "contract of hire, oral or written, expressed or implied." In order to answer this question it is necessary to consider the facts as set out in your letter. In your request you say that the shine boy is paid no compensation in the form of money, but is granted the privilege of shining shoes in the barber shop. Second, the barber supplies nothing necessary to the vocation of shining of shoes except a place in which to work—the barber shop itself. The question also arises (3), does the shine boy perform any services for the barber of any kind or nature in which the barber exercises complete control over the manner of the said work. In the case of *Birmingham Post v. Sturgeon*, 227 Ala. 162, 149 So. 74, the Supreme Court of Alabama said:

"It is not possible to lay down a hard and fast rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employee or independent contractor. Each case must depend on its own facts. Ordinarily, no one feature of the relation is determinative, but all must be considered together."

"This court has had occasion frequently to point out the distinguishing characteristics between the relation of an independent contractor and that of a servant. A clear and concise statement of such distinction is made in our case of *Republic I. & S. Co. v. McLaughlin*, 200 Ala. 204, 75 So. 962, to the following effect: The relations is "determined by whether or not the person for whom he is working 'has control over the means and agencies' by which the work is done (citing cases), (and) or has control over the means and agencies 'by which the result is produced' (*Harris v. McNamara*, 97 Ala. 181, 12 So. 103). In line with this test is the rule that he is deemed the master who has the supreme choice, control, and direction of the servants and whose will the servant represents, 'not merely in the ultimate result of his work, but in all its details' (*Lookout Mt. I. v. Lea*, 144 Ala. 169, 39 So. 1017). For the person to be a servant the other party must retain "The right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done" (39 C. J. 35), as he has "a reserved control or direction of the work" (*Alabama Power Co. v. Bodine*, 213 Ala. 627, 105 So. 869). "Giving orders is the role of the Master". *Alabama Power Co. v. Bodine supra*."

"In the case of *Martin v. Republic Steel Co.*, 146 So. 276, the court held that the criterion is not whether the owner did in fact exercise supervision, but rather did he have the right to do so; did he possess the power of control."

"(See also *General Refrigeration Sales Co. v. Taylor*, 158 So. 314."

In my opinion, the barber does not retain supervision or complete control over the manner and detail of the work of either the shine boy or the manicurist. From the facts set out in your letter it is apparent that these parties supply their own supplies; they are paid no compensation by the barber himself; they do not account to the barber for any money received. From your statement of facts, it seems that these parties perform their service for the general public as well as the patrons of the barber shop, and that the barber exercises no control whatsoever over the services rendered by them. It seems that the shine boy and the lady manicurist are given the privilege of practicing their vocations within the barber shop under no contract of hire, express or implied, since nothing is paid to them either in the form of cash or in any other form, as defined by Section 2, sub-section (o) of the Unemployment Compensation Law. It is, therefore, my opinion that under the Alabama Unemployment Compensation Law, neither the shine boy nor the lady manicurist is an employee of the barber within the meaning of the Alabama Unemployment Compensation Act, but that such parties are independent contractors, operating a business for themselves over which the barber has no control. I refer you to an opinion of this office to Hon. J. L. Kaufman, Chairman, Unemployment Compensation Commission, under date of February 17, 1936, which held that an independent contractor does not come within the definition of employment, as set out in the Unemployment Compensation Law, quoted *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1937.

Hon. J. A. Simpson,
State Senator,
831 First National Bank Building,
Birmingham, Alabama.

Licenses—Automobile Dealers—

Counties can collect fifty per cent of license levied for the benefit of State under Act of the Special Session of 1936-1937, page 186, which amends Schedule 12 of Section 348 of Revenue Acts of 1935.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 3, 1937, in which you request my opinion as follows:

"The Automobile Dealers Association of Alabama by Mr. C. E. Anderson, its Secretary, has asked me to inquire of you whether or not counties can collect fifty percent of the licenses levied for the benefit of the State on Automobile Dealers under Schedule 12 of Section 348 of

the General Revenue Law of 1935, as amended by House Bill 46 by Mr. Poole, approved March 2nd, 1937, and found at page 186 of the Acts of the Special Session of 1936-37.

"Your opinion and ruling on this matter in advance of the date for payment of these licenses would doubtless save a great deal of confusion and uncertainty and will be greatly appreciated by the writer, the Association and all concerned."

Schedule 12 of Section 348 of the General Revenue Law of 1935, prior to the amendment referred to in your letter, was considered by this office in an opinion reported in Quarterly Reports, Volume I, page 26. It was there held that under said Schedule an automobile dealer is liable for both State and County license in each county in which he maintains an established place of business. I quote from that opinion:

"By subsection (b) of Section 360, it is provided:

"There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in or who shall carry on any of the occupations, businesses, professions or callings or shall exercise any privilege or do any act for which a license is charged by the State of 50 per cent of the State licenses or privilege tax except as herein otherwise provided."

"The question, which I assume you raise, is whether that portion of Schedule 12 appearing on page 240 (providing certain exemptions) is intended to exempt the automobile dealer from the payment of county license as such automobile dealer. In my opinion, it does not. It is my judgment that the provision 'and not to be required to pay any further or additional State and County licenses to handle or sell automobile accessories or parts, radios, tires and batteries, etc.' is meant to apply to those specific things named. As I read the Section, by paying the proper State and County licenses as an automobile dealer, such dealer is exempted from the payment of both State and County licenses levied on dealers in the various other commodities named.

"I am led to this by the specific manner in which the Legislature in various sections, specifically declared that no county license is required. By Schedule 2, it is stated: 'But no license shall be paid to the county'. The same provision appears in Schedule 5, in Schedule 9, in Schedule 10, in Schedule 48, in Schedule 58, in Schedule 100 and in Schedule 106. The emphasis with which the Legislature in these various sections specifically stated that no license should be paid to the county, indicates to my mind that the absence of such provision in Schedule 12 indicated an opposite intent. Schedule 18 levies a license on automobile dealers. It then authorizes such automobile dealer to do certain other things without the payment of an additional license either State or County. The fact that the words 'State license' is inserted in the latter proviso indicates that the licenses from the operation of which the dealer was exempted are those specifically set out.

"It is a rule of construction so well known as to hardly call for citation, that exemptions are to be strictly construed and that none can be given except where there is a clear legislative intent. State v.

Elba Bank & Trust Co., 91 So. 991. Applying this rule, it is my judgment that the automobile dealer is liable for both State and County license on each established place of business according to the scale set out in Schedule 12."

Thereafter and by the Act of the Special Session of 1936-37, at page 186, this schedule was amended by adding the following immediately after the Schedule of amounts of licenses:

"Provided, that upon the payment of the license according to the foregoing schedule, a dealer in automobiles may do a general automobile and automotive business and shall not be required to pay any license or privilege tax or tax on the sale of motor vehicles based on the gross receipts or gross proceeds derived from such sales, except the license or privilege tax on the gross proceeds or gross receipts derived from the sale of new automotive vehicles as levied in House Bill 179, approved February 23, 1937, or to pay any additional State and County licenses or privilege tax to sell automobiles or automotive vehicles except the license or privilege tax on gross proceeds or gross receipts derived for the sale of new automotive vehicles as levied in House Bill 179, approved February 23, 1937."

The proviso in Schedule 12 as to non-liability for further licenses to sell accessories, part and so forth, was also changed by adding a reference to the tax on gross proceeds or gross receipts from sales under the provisions of an act known as House Bill 39, approved December 17, 1936, and the tax on gross receipts as levied in House Bill 179.

The question then becomes whether the amendment of the act by the inclusion of the quoted portions changes the construction previously placed upon such Schedule 12 with respect to the necessity of additional county license in each county in which the dealer does business. In my opinion, the amendment does not have that effect. It is my judgment that the amendment was solely for the purpose of making more definite the provisions of this schedule in connection with the Luxury Tax Act (House Bill 179, approved February 23, 1937). You will note there is no specific exemption in the amended act stating that no license shall be paid to the county. The quoted amendment refers to license or privilege tax based on gross receipts. There is then added "or to pay any additional State and County license, etc." As stated in the opinion above quoted, the Legislature has emphasized in certain other sections that no license shall be paid to the county. The absence of any statement in this amended schedule specially stating that no license shall be paid to the county indicates to me that it was not the intent of the Legislature in amending said Schedule 12 to change the effect of Section 350, subsection (b). In my opinion, therefore, under said schedule, as amended, counties may collect fifty per cent of the license levied for the benefit of the state.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 29, 1937.

Hon. E. A. Kimbrough,
Sheriff, Russell County,
Seale, Alabama.

Jails—County is not liable for cost of refrigeration of prisoners' food in sheriff's home.

Sheriff—Sheriff has no claim against county for rent of his kitchen in preparation of prisoners' food, even though there is no kitchen in the jail.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of September 8, 1937, which is as follows:

"Please give me a ruling on the following subject. I as Sheriff of Russell County have to furnish the kitchen at my home for preparing foods for the prisoners confined in the jail, the County has no kitchen of their own. (1) Please advise me whether or not the County should be responsible to me for ice or refrigeration used in my kitchen for preserving the foods used for prisoners confined in jail; (2) also please advise me whether or not the County would be liable to me for a reasonable amount of money for the use of my kitchen as they have no kitchen for which the food can be prepared."

In response to your first inquiry, I refer you to an opinion of this office under date of August 16, 1937, to Hon. I. I. Moses, Chairman, Russell County Court of Commissioners which holds that a county is not authorized to pay for refrigeration of prisoners' food if the refrigerator is kept in the home of the sheriff.

In answer to your second inquiry, I refer you to Section 5024, Code of Alabama, 1923.

"Section 5024.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue or any other state or county officer, who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any way pecuniarily interested in any such contract or sale, as principal or agent, must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

I am of the opinion that the above quoted section prohibits the sheriff from renting his kitchen to be used in connection with the county jail.

In considering further the question of whether or not a county is required to furnish and maintain a kitchen in connection with the county jail, I am unable to find any authority requiring such maintenance.

Section 4826, Code of Alabama, 1923 imposes upon the sheriff the duty of feeding county prisoners but provides no particular manner in which this shall be done. Section 4828, Code of Alabama, 1923, as amended by Act 203, General Acts of 1935, p. 595, provides the allowance for feeding prisoners. Section 4835, Code of Alabama, 1923 provides that in feeding prisoners the sheriff may use foodstuffs from his own garden or store and charge therefor a fair market price.

In considering all of these sections together, it seems to be the patent intent of the legislature to impose directly upon the sheriff the responsibility of feeding prisoners in any manner he sees fit, if it meets with the approval of the county governing body and the State Prison Inspector as provided by Sections 4825 and 4834, Code of Alabama, 1923, respectively.

Therefore, it is my opinion that county is not required to maintain a kitchen in connection with the county jail except under Section 4860, Code may legally equip such kitchen.—Quarterly Report of the Attorney General, Vol. II, p. 241.

It is my opinion that Section 4860, Code of Alabama, 1923 is broad enough to authorize a State Prison Inspector to require the county governing body to build a kitchen in a particular jail if in his opinion such kitchens is "a necessary addition or alteration."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 1, 1937

Hon. A. F. Harman, President,
Alabama College,
Montevallo, Alabama.

An officer of the United States army who is not a resident of Alabama, who enters a pupil in the Alabama College, comes under the regulations of Section 510 of the Alabama School Code of 1927, which deals with the admission of students from other states.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 8, 1937, in which you request my opinion as follows:

"Under the rules and regulations of Alabama College we charge non-residents who attend the college an out-of-state extra fee of \$24.00 per year.

"We are registering this week a student whose father is a lieutenant in the United States army located for the time being at Pensacola. In the circumstances will you kindly express to me your opinion as to whether or not an exemption from the out-of-state fee can be legally granted?"

I also have your letter of September 16, 1937, in answer to my letter of September 14, in which you give additional facts as follows:

"Replying to your letter of September 14th, for which I thank you, it will suffice for our purpose if your opinion will cover officers of the United States army who are **not** citizens of Alabama. It is my information that the lieutenant now stationed at Pensacola is not a citizen of Alabama. We will be able to handle the question proposed if it pertains to citizens of Alabama who are temporarily resident in other states."

I note from your letter of September 16, 1937, that you say the lieutenant now in the United States Army and stationed at Pensacola, Florida, has never been a citizen of Alabama. In this connection, I call your attention to Section 510, Alabama School Code of 1927, which is as follows:

"Section 510. Who May Be Admitted to College.—Any white girl or woman residing in Alabama, of good moral character, in good health, and of sufficient physical and mental development, to be judged of by the President, who shall comply with all the requirements prescribed by the Trustees, may be admitted into the institute, and upon completing the course of study prescribed at the time of her admission, to the satisfaction of the Faculty, shall receive the certificate, diploma, or degree she may have earned. Whenever the accommodations of the institute are sufficient to admit more students than apply from Alabama, then students from other States or Countries may be received and instructed in the institute upon such terms and conditions as may be imposed by the President or Trustees."

In view of the above, I am of the opinion that such Lieutenant comes under the latter sentence of the above section and would be required to enter his daughter in the Alabama College under the same terms and regulations as other non-residents enter theirs. This sentence reads as follows:

"Whenever the accommodation of the institute are sufficient to admit more students than apply from Alabama, then students from other States or Countries may be received and instructed in the institute upon such terms and conditions as may be imposed by the President or Trustees."

The fact that such Lieutenant is in the army of the United States can make no difference. The section above quoted makes no such exemptions.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 2, 1937

Hon. Charles W. Lee,
State Comptroller,
Capitol.

The fee provided for the Clerk of the County Courts. Act No. 225, House Bill 71 by Merrill, pertaining to preliminary investigations before the County Court, does not authorize the payment of the fee therein provided by the State or Convict Department.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 8, 1937, in which you request my opinion as follows:

"The items of cost and the amount of each item paid by the Convict Department in hard labor and penitentiary cases are authorized by Section 3667 of the Code of 1923.

"Should the Convict Department pay the two dollars (\$2.00) clerk fee as set out in House Bill No. 71, approved March 2, 1937, General Acts 1937, page 268, or is the two dollar (\$2.00) fee an item of cost to the defendant not payable by the Convict Department?"

In answer to your inquiry, I am of the opinion that the \$2.00 fee in question is an item of cost chargeable to the defendant under House Bill No. 71, approved March 2, 1937, General Acts of 1937, page 268, but is not such an item as is payable by the Convict Department. Section 3667 of the Code of 1923 provides what fees are payable by the Convict Department on the conviction and delivery of a convict to the penitentiary authorities and the Act referred to above does not in any wise amend this Section. It is true the Section referred to by you provides that the Clerk may charge this fee, yet it does not provide for its payment by the State, and in my opinion, this can only be done by amending Section 3667, supra, which Section is as follows:

"3667. Costs of conviction; items to be paid.—Whenever a defendant is convicted, and sentenced to the penitentiary the following items of costs in the case shall be paid out of the convict fund, to the extent and in the manner hereinafter prescribed, to-wit: for issuing each capias or warrant (once), fifty cents; docketing cause, ten cents; issuing each subpoena for state's witnesses, twenty-five cents; each undertaking or recognizance, and entering same, fifty cents, trial, fifty cents; entering judgment, twenty-five cents; final judgment twenty-five cents; record for supreme court (per hundred words), fifteen cents; making final record (per hundred words), fifteen cents; making transcript and certificate thereof (per hundred words), fifteen cents; entering forfeiture against defendant, fifty cents; sheriff's fees, executing each warrant or writ of arrest, four dollars; approving bond, one dollar; serving each subpoena for state witnesses, fifty cents; for committing prisoners to jail, one dollar; for summoning jury in capital cases, three dollars; state witnesses' fees, which are fixed at seventy-five cents per diem before the grand jury and seventy-five cents per diem before the court of conviction, and five cents per mile for each mile traveled to and from the grand jury and court of conviction, but

no witness shall be entitled to fees in more than one case on the same day; cost of committing magistrate and constables on preliminary trial, both together not to exceed five dollars; court stenographer's fee not to exceed three dollars; and when the conviction is secured by a solicitor other than a solicitor who is paid a salary by the state, or when the solicitor is paid a salary by the county, such bill of costs shall also include the solicitor's fee, which is now or may be allowed by law."

I might call your attention to the fact that in printing the Code of 1923 a typographical error appears in the above section where it says "costs of committing Magistrate and constable or preliminary trial, both together not to exceed five dollars." The word *or* should be *on*, as this is the way it appears in the Code as adopted now on file in the Secretary of State's office. So in copying the section I made the correction, substituting *on* for *or*.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 5, 1937

Hon. Madison L. Smith,
Tax Assessor,
Washington County,
Chatom, Alabama.

Taxation—Homestead—Act No. 107, General Acts 1936-1937, p. 113.

1. Homestead exemption from state taxes is not granted unconditionally by Act No. 107, *supra*, but is dependent upon exemptioner's assertion of claim therefor.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry, which I quote as follows:

"Does the law within itself exempt the head of the family 160 Acres of land, valued up to \$2,000.00 or does the head of the family have to set up a claim with the tax assessor before he is entitled to his exemption?"

"If a claim is required to be made by the taxpayer in order to get his exemption, can his claim be signed by some one who has knowledge of his property as agent, or in case the taxpayer is sick and can't come to make his claim, can some one sign for him as agent?"

The Legislature provided by Act No. 6, General Acts of 1936, p. 4, approved March 12, 1936, that homesteads be separately listed and valued, thus evidencing an intention that the exemptioner shall perform some assertive act for his homestead exemption. In my judgment, it was not the intention of the Legislature, manifested by the adoption of this Act, that the law granting

the homestead exemption should be self-executing to the extent that the exemptioner is under no obligation to do or perform an assertive act in pursuit of the gratuity which the Legislature offered.

To hold otherwise would lead to endless and unnecessary confusion in determination of homestead rights. The tax assessor would be required to check every piece of property assessed for taxation, or subject to taxation, for the purpose of determining whether or not the assessed property, or any portion thereof, is used as a homestead. The purchaser of property at a tax sale would not know at the time of purchase whether the property is a homestead. Sales of property for payment of taxes would be greatly impeded because of the uncertain use of the property. There would be endless confusion in determination of titles. I, therefore, conclude that the Legislature imposes upon the exemption a mandate to the taxpayer that he must assert his claim therefor, or failing therein, that he waives the tax gratuity.

The Act granting the exemption was not approved by the Governor until February 20, 1937, and the application thereof to current taxes was not determined until the Supreme Court of Alabama held that it was effective for the tax year 1936-1937. In Re: *Opinion of Justices*, 175 So. p. 690. When the Act was approved the tax assessments had already been finished. Logical inference may be drawn that the Legislature intended that the taxpayer should be permitted to amend his tax return by separately listing and valuing his homestead. The procedure employed to amend the tax return amounts to an assertion of the taxpayer's claim for homestead exemption. No claim could have been filed before February 20, 1937.

The homestead claim for this current tax year may be asserted by filing with the tax assessor a verified description and valuation of the homestead.

Your second question has been answered affirmatively in an opinion of this office to Hon. John M. Graham, Tax Assessor, Jackson County, Scottsboro, Alabama, dated September 20, 1937, and by another opinion of this office to Hon. John J. Flowers, Tax Assessor, Montgomery County, Montgomery, Alabama, dated September 22, 1937. Copies of both opinions have been sent you.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 6, 1937

Hon. T. V. White,
Clerk, Board of Revenue,
Sumter County,
Livingston, Alabama.

Three Mill District School Tax—Duty of Board of Revenue.—
Alabama School Code of 1927, Section 280.

Where electors vote to require levy of special three-mill district school tax, Board of Revenue must declare result of election and cause

Tax Assessor to assess the same. Duty of Board of Revenue unaffected by any agreement of County Board of Education.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 13, 1937, in which you request my opinion as follows:

"The Board of Revenue respectfully requests your earliest possible opinion on the following matter.

"The enclosed contract is a copy of a contract entered into by the Sumter County Board of Education and the Allison Lumber Company which your office held to be a valid contract in 1933 in an opinion to the State Supt. of Education requested by the Sumter Co. Supt. of Education.

"At the request of the Sumter Co. Board of Education the Board of Revenue of Sumter County called an election and submitted to the voters the issue embraced in the enclosed ballot, and the election carried for consolidation and taxation. The consolidation and taxation voted on by the people covers the area specifically mentioned in the enclosed contract in which the Board of Education had previously contracted not to include in the taxing districts and not to include in any requests for election for school district taxation for the period stipulated and which has not expired.

"The County Supt. of Education after the canvassing of the election returns appeared before the Board of Revenue and requested the Board when it made its levy to exempt from the levy the territory embraced in the contract.

"The Board of Revenue therefore requests of you in writing an opinion specifically setting forth the Board of Revenue's legal duty under the circumstances.

"Inasmuch as a fiscal year is at hand and the Board as well as the Tax Assessor and Collector must take action appropriate to your opinion, a return mail opinion becomes highly desirable. If further details are necessary to your opinion please get in touch with us immediately and they will be gladly furnished."

Under the contract referred to, the Sumter County Board of Education agreed that in consideration of certain payments made toward the expense of erecting a high school, for which payments the Allison Lumber Company was not obligated, that it, the Board of Education, would not include other properties of the lumber company within districts on which a three-mill tax was levied, and further agreed that for a period of ten years it, the County Board of Education, would not request an election to be held in the beat in which said Allison Lumber Company owned a large tract of property. It is further my understanding from you that this contract has been enforced for nine years and only has one more year to run. However, the County Board of Education requested the Board of Revenue to call an election submitting

to the voters of the districts involved the question of consolidation with other districts and the levying of a special three-mill school tax.

Upon the canvassing of the election returns, it appeared that both issues, for consolidation and taxation, were passed by the boards. It thereupon becomes the duty of the Board of Revenue of Sumter County to proceed as required by Section 280 of the Alabama School Code of 1927. Under this section it is the duty of the Board of Revenue to levy said special tax and cause the tax assessor to assess the same on the taxable property involved. In my opinion, the agreement of the County Board of Education with the Allison Lumber Company not to request an election in the district involved can in no way effect the right and the duty of the Board of Revenue, and the Board of Revenue has no authority to exempt from the taxes levied the territory embraced in the contract.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 6, 1937

Hon. J. B. Van Valkenburgh, Chairman,
Madison County Board of Commissioners,
Huntsville, Alabama.

County—Liability thereof for tort—

1. Under facts stated, county not liable for tort of employee and Court of County Commissioners has no authority to pay damages therefrom.
2. County not liable for damages arising from negligent maintenance of highway.
3. County not liable for injury sustained on a bridge unless negligence and statutory requirements imposing liability on county concur.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of September 21, 1937, in which you request my opinion as follows:

"Kindly inform us as to whether it is your opinion that the following claims that have been filed with and approved by our Board, can be legally paid by them:—

"1. Pick-up truck driven by county employee, Potts, going east on the road, and car belonging to Miss Allie Hall driven under the super-

vision of her brother who was riding in the car at the time, collided. Evidence introduced before this Board showed that negligence existed on the part of both drivers. This accident occurred in the day time. Damages approved amounted to \$40.00.

"2. Mr. E. D. Howard, operating his father's car, ran over a large pile of dirt which was being used as a barricade on a culvert excavation, and caused damage to his car to the extent of \$25.00. This excavation had been across the road for about six weeks and it was common knowledge that this excavation existed, and this embankment was clearly visible for 400 or 500 yards away. This accident occurred at night time.

"3. Another case of this kind, was of a boy riding a horse that stepped in a hole in a county bridge and the horse had to be destroyed because of the injury resulting. Damages amounting to \$40.00. This accident happened at night time.

"Our County Attorney is of the opinion that these claims cannot be legally paid, but in order to satisfy the parties involved, we are asking that you give your opinion on them."

In answer to your first inquiry, it is my opinion that the claim cannot be legally paid. You do not give me any information as to the scope of employment of the county employee in question, Potts. Ordinarily, even where authority to sue a governmental agency of the State is given by statute, such authority does not extend to suit upon a tort for damages. **White vs. Insane Hospital**, 138 Ala. 479, Biennial Report of the Attorney General, 1926-38, page 730. Regardless of this, however, under the facts stated by you, it appears that both parties were at fault and, therefore, the claimant is barred from any recovery by contributory negligence. It is therefore my opinion that any payment on the claim would be a mere gratuity on the part of the County, and since there is no statutory authority for a court of county commissioners to spend county funds gratuitously, the claim in question cannot be legally paid.

2. Your next inquiry involves the liability of the county for negligence in maintaining a highway.

"County authorities exercise a quasi legislative authority, and, in the absence of a statute expressly declaring liability, the county cannot be made answerable for damages resulting from the unskillful or negligent manner in which the highway is constructed or maintained. *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730, *Lee County v. Yarbrough*, 85 Ala. 590, 5 So. 341, *Barbour County v. Horn*, 48 Ala. 649, *Brown v. Shelby County*, 214 Ala. 252, 85 So. 416." Per Sayre, J., in *Barbour County v. Reeves*, 217 Ala. 116 So. 119.

It is therefore my opinion that this claim cannot be legally paid. I premit any discussion of the question of contributory negligence.

3. Your last inquiry is as to the payment of a claim for an injury to a horse resulting from a hole in a county bridge. You do not advise me whether this bridge was constructed by the county, whether the bridge was constructed by a contractor who gave a bond, or whether the bridge was constructed by a contractor without a bond. These might be material questions. It has been

many times decided that the county is not liable for damages resulting from negligence in maintaining a bridge except under a statute expressly declaring such liability. **Barbour County v. Reeves**, 217 Ala. 415, 116 So. 119; **Hovater v. Franklin County**, 217 Ala. 439, 116 So. 526. On the other hand, the county is liable under certain circumstances when the bridge is constructed by independent contractors. Section 6457, Code of 1923. It is therefore my opinion that if the bridge in question was constructed by the county, there is no liability upon the county for the injury to the horse.

In the event the bridge was constructed by an independent contractor under such circumstances that the county might become liable therefor under the provisions of Section 6457 of the Code of 1923, there would arise the further question of whether or not the county was negligent. I advise you that, in my opinion, the county is not liable for this injury unless there was negligence on the part of the county officials, concurring with the statutory requirements imposing liability on the county. Quarterly Reports 4, page 5.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 6, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

County Board of Education—

1. Not authorized to pay elective Superintendent extra compensation for handling free text books, in the absence of substantial new and additional duties.

2. May make an allowance to Superintendent for expense of handling free text books.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

The first three inquiries made in your letter of February 23, 1937, have been answered in an opinion of this office to the County Superintendent of Education of Perry County, dated September 23, 1937. The balance of your letter reads as follows:

"On September 5th, 1935 the County Board of Education of Perry County passed the following resolution:

"Upon the recommendation of the Superintendent the contract formerly held with the Board by Perry County Oil Company to furnish gasoline and oil to the Bus drivers was cancelled and the policy of the

Board to continue to furnish gasoline and oil for the bus drivers be discontinued until such time as such arrangements would be profitable to the Board. THE SUPERINTENDENT WAS AUTHORIZED, EMPOWERED AND DIRECTED TO USE THE COMMISSION TO BE PAID TO THE BOARD BY E. E. FORBES AND COMPANY FOR THE HANDLING BY THE SUPERINTENDENT OF THE FIRST GRADE BOOKS THIS YEAR BE USED BY HIM AS OFFICE EXPENSE.'

"1. Has the County Boards of Education authority to pay Elective Superintendents extra compensation for handling the Free Text Books?

"2. If the County Boards of Education have not the authority to pay Elective Superintendents such extra compensation, and the Superintendent has received the compensation, is not the amount so received a legal charge against his official bond?

"The action of the County Board of Education on September 5th, 1935 was based on a conversation the Superintendent had with the State Department of Education. This conversation was confirmed in a letter from the Department of Education addressed to County and City Superintendents, dated January 11, 1936. A copy of this letter is attached here to."

Your first inquiry is whether the County Board of Education has authority to pay elective superintendents extra compensation for handling free text books. In the case of *McMurray v. Board of Education of Franklin County*, 216 Ala. 144, 112 So. 644, the Supreme Court held that the salary of an appointed superintendent of education could not be raised during his term of office without violating Section 281 of the Constitution. In my opinion, the same rule would apply to the salary of an elective Superintendent of Education whose salary was fixed by the Board of Education pursuant to Section 149, Alabama School Code of 1927. In *McElderry v. Abercrombie*, 213 Ala. 289, 104 So. 671 and *Taylor v. Davis*, 212 Ala. 282, 102 So. 433 it was settled by the Supreme Court that extra compensation for services in performance of substantial new and additional duties may be granted by the legislature without violating the Constitutional prohibition. The "free text book Act," General Acts of 1935 page 594, places no additional duties on County Superintendents of Education. Whether such substantial new and additional duties have been placed upon them by the Board in administering the Act, does not appear from your letter. In the absence of such additional duties as would bring the case under the holding of *McElderry v. Abercrombie*, supra, it is my opinion that the County Board of Education has no authority to pay an Elective Superintendent extra compensation for handling the Free Text Books. If such Superintendent receives extra compensation to which he is not entitled, the amount so received is a proper charge against his official bond.

However, it seems to me that this question of extra compensation is not involved from the facts set out in your letter. The resolution of the County Board of Education of Perry County did not make provision for "extra compensation" but merely authorized the Superintendent to use the funds "as office expense." In an opinion of this office to the Hon. R. B. Carr, (Quarterly Reports, Vol. II, p. 161, 163,) the distinction between "compensation" and "allowance for expense" was thoroughly considered and discussed. Such an allowance for incidental expenses is not within the constitutional provision against increase of compensation.

Quarterly Reports II, pages 161 and 163 and cases cited.

Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488.

Fergus v. Russell, 270 Ill. 304, 110 N. E. 130.

Ware v. Battle Creek, 201 Mich. 468, 167 N. W. 891.

Of course, the Superintendent must account for all such funds coming in to his hands. (School Code of 1927, Sec. 147). If he appropriates any part of the funds to his own use as additional compensation, he exceeds the authority granted him under the resolution to use such funds "as office expense", and any amount so misappropriated would be a proper charge against his official bond. If the Superintendent uses the fund in question only in defraying office expense, and properly accounts there for, in my opinion he is authorized to do so and would not be liable on his official bond for the amounts so expended for office expense.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 6, 1937

Hon. T. B. Smith,
Register Circuit Court,
Sumter County,
Livingston, Alabama.

Where a party is cited for contempt for failing to pay alimony formerly decreed against him, this citation does not carry a trial tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 27, 1937, in which you request my opinion as follows:

"I wish you would give me a ruling on the following case as to whether I should collect a trial tax or not.

"A year ago there was a divorce case filed and alimony asked. The decree was granted and alimony given. The defendant paid the alimony for several months and then quit. The complainant then comes in and files a petition asking that the defendant be cited to appear and show cause why he had quit complying with the decree. I construed that the trial tax should be collected as it went on the docket as a new case."

I am of the opinion that where a party in a divorce suit has had alimony adjudged against him and fails to comply with the terms of the decree granting alimony and is cited by the court to show cause why he should not be adjudged in contempt for such failure to comply with the court's decree, there can be no trial tax assessed for the reason that this, in my opinion,

is purely an ancillary proceeding which is put in operation to force compliance with said decree which was granted in the original suit.

2 C. J. 1336 defines "ancillary suit" as "an action in aid of the execution at law and which is in effect a continuance of the suit at law to obtain the fruit of the judgment or to remove the obstacles of its enforcement."

In 1 Words and Phrases, page 451 (3rd Series), it is stated that an "ancillary suit" in equity is one growing out of a prior suit in the same court pending upon or instituted for the purpose of either impeaching or enforcing the judgment or decree in a prior suit, and the jurisdiction of said suit is dependent upon the jurisdiction of the court of the prior suit.

From the above authority I think the matter that you have is clearly an ancillary proceeding attempting to enforce the original decree and, therefore, does not carry a trial tax.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 7, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Costs—Sections 8684, 5287, 6670 and 4039, as amended by General Acts, 1927, page 45, Code of Alabama, 1923.

1. Court is without lawful authority to impose belated sentence upon prosecutor who was not presently sentenced for failure to pay court costs taxed against him.

2. Bond of Circuit Clerk who fails to issue lawful execution for costs taxed against prosecutor is liable for damages accruing by reason of such failure.

3. Fine and forfeiture fund of county is not chargeable with uncollectible costs taxed against prosecutor.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of recent date which is as follows:

"Please refer to Section 4039, Code of 1923, as amended by General Acts, 1927, page 45, and advise me as follows:

"(1) Can the prosecutor in such cases, at a later date, be brought into court and sentenced to jail for ten days?

"(2) Would the Circuit Clerk and his bond be liable for the amount of cost taxable to such prosecutor by his failure to issue an execution?

"(3) In the event execution for cost was properly issued, would the fees of the officers of the Trial Court be a proper claim against the Fine and Forfeiture Fund upon the return of the execution (no property found)?"

I am of the opinion that a court is without lawful authority to impose a belated sentence upon a prosecutor who was not presently sentenced for failure to pay court costs taxed against him.

Section 5287, Code of Alabama, 1923, requires the court to imprison in the county jail, or to sentence to hard labor for a period of ten days, any prosecutor who presently fails to pay court costs taxed against him. If such delinquent prosecutor is released without imposition of the ten day sentence, the court has no authority to invoke the aid of Section 6670, Code of Alabama, 1923, to the end that the prosecutor may be so sentenced. The release of the prosecutor from custody, in my judgment, is tantamount to a discharge. The prosecutor cannot lawfully be taken again into custody for the purpose of imposing a judgment or sentence which should have been imposed before his release from custody. The court has no lawful authority to set aside a judgment taxing costs against the prosecutor for the sole purpose of entering a new judgment which inflicts penal punishment authorized by the statute. The original judgment was not void, but was valid and binding upon the state and the defendant.

Referring to your second question, the clerk of the circuit court, upon failure to issue lawful execution for the purpose of collecting a judgment for costs entered against the prosecutor, would be liable for damages accruing by reason of such failure. See opinion of this office to Hon. Chas. W. Lee, Comptroller, July 19, 1935, Book A, p. 228.

I know of no law which permits uncollectible costs taxed against a prosecutor to be paid out of the fine and forfeiture fund of the county. Section 4039, Code of Alabama, 1923, as amended by an act approved February 18, 1927 (General Acts, 1927, p. 45) does not authorize such payment. Therefore, your third question should be answered in the negative.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 7, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Under facts as stated, Probate Judge not required to pay for the printing of certain forms in the books of permanent record supplied by the county governing body.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Section 7285 of the Code of 1923 provides that Probate Judges are entitled to a fee of fifteen cents per hundred words for recording deeds and mortgages.

"The County governing body purchases the volumes as permanent records in which these records are made."

You request my opinion as follows:

"If for the convenience of the Probate Judge, certain forms, as used by local business firms, are printed into these volumes supplied by the county, should the Probate Judge pay for the printing?"

In my opinion your question should be answered in the negative.

Section 9604 of the 1923 Code of Alabama provides as follows:

"Section 9604. STATIONERY OF OFFICERS PAID FOR BY COUNTY.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

In my opinion, at the present time a suitable book for recording papers is one in which there are as many printed forms as possible, thereby adding to the efficiency of the office by expediting the work.

The premises considered, it is therefore my opinion that the Probate Judge should not have to pay for printing the forms in the record books.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 18, 1937

Hon. Charles W. Lee,
State Comptroller,
CAPITOL.

Money collected as trial tax for each case that goes upon the docket of the Circuit Court should be remitted to the State and County Treasurers on the first day of each month.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 23, 1937, in which you request my opinion as follows:

"Under the present Revenue Code a Trial Tax of \$3.00 is to be taxed in each case that goes on the docket in Circuit Court.

"The question arises as to when this Trial Tax is to be remitted to the State, that is to say, is it to be remitted monthly?

"When this Trial Tax is collected one-half of it is remitted to the County and Circuit Clerks are required by law to make remittances of monies collected for the County monthly, therefore, a report of this Trial Tax being made on a form which provides remittance to the County also provides remittance to the State and we can see no other conclusion to reach but that State Trial Tax remittance should be remitted monthly, however, an opinion from your office will clarify the situation and we will thank you to give us your ruling at an early date."

In answering your request, I call your attention to Section 9 of an Act to provide for the general revenue of the state, approved July 17, 1935, General Acts of 1935, page 256. This section is dealing with trial tax and its distribution, and says among other things as follows:

"Section 9. A trial tax of three dollars (\$3.00) be, and the same is, hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, **and when collected** to be paid by the clerk or register of such court as follows: * * *

This section, strictly construed, means as collected, but we do not think the lawmakers intended that as soon as collected it should be transmitted to the state and county. If we should so hold, it would result in the clerk remitting almost every day to the state and county, but I think the Comptroller should require these remittances to be made on the first of each month. Section 303 of the 1935 Revenue Act, supra, I think, gives you the authority to make this requirement.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 20, 1937

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Mule dealer required to pay license for each place of business, even though such places are within one county.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of October 1, 1937, in which you request my opinion as follows:

"A mule dealer in this county has two barns in the same city, employs help at each barn and sells and trades horses and mules at each barn.

"Please advise us if this dealer must buy separate license for each barn."

Section 350(a) of the General Revenue Act of 1935 (1935 General Acts at page 558) provides:

"Whenever a license is levied in this act, there shall be collected both a state and county license for each place of business except as specifically otherwise provided."

The license about which you inquire make no exception. It reads as follows:

"Each person engaged in the business of buying, selling or exchanging HORSES, MULES, JACKS, JENNETS, shall pay a license tax of twenty dollars (\$20.00) in each county, where such person engages in said business." Schedule 72 of the 1935 Revenue Act, page 245, Simon's Revenue Code.

As the Revenue Act, of which this section is part, specifically provides that each license levied shall be collected for each place of business unless otherwise provided, and as the schedule to which you refer does not make such exception, I am of the opinion that a license should be required for each place of business.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 21, 1937

Hon. J. R. White,
Chairman, Board of Revenue,
Walker County,
Jasper, Alabama.

Counties—Where valid debts outstanding as of October 1, 1935, were paid by advances from the General Fund rather than refunding warrants, refunding warrants may now be issued under the provisions of Act No. 379, H. B. 191, approved September 9, 1935 (General Acts, 1935, page 803) known as the County Financial Control Act.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of October 6, 1937, which is as follows:

"I would like to have your opinion as to whether or not Walker County may issue and sell interest bearing warrants under any provisions of the County Financial Control Act under the following circumstances and for the following purposes:

"On October 1, 1935, Walker County had outstanding warrants and claims in an amount totaling in excess of \$18,000.00. It is my understanding that the county was entitled to issue refunding warrants to refund the outstanding warrant indebtedness and to issue funding warrants to pay the claims. The county intended to refinance this indebtedness but on account of delays in arranging for the re-financing of it decided to advance from its general fund a sufficient amount of money to take care of these items of indebtedness until such time as warrants could be issued to pay said debts. The amount advanced from the general fund for this purpose was taken from the current revenues of the county. It is now the desire of the Board of Revenue to issue and sell said warrants in order to replace said money with the general fund of the county.

"Please advise if the Board of Revenue of Walker County may issue warrants in the sum of \$18,000.00 payable over a period not exceeding twenty years for the purpose of paying said warrants and claims which were outstanding on October 1, 1935, said payments to be made by returning the advance made from the general fund of the county for the purpose stated above."

I am of the opinion that your inquiry should be answered in the affirmative, provided that the money used to pay the outstanding claims as of October 1, 1935, was actually advanced from the General Fund and not merely paid by the General Fund directly, and provided further that the claims in question were valid claims against the county.

Construing the provisions of Act No. 379, H. B. 191, approved September 9, 1935 (General Acts, 1935, page 803) known as the County Financial Control Act, this office has repeatedly held that valid claims outstanding as of October 1, 1935, may be refunded. It is also held that where a temporary loan was made to pay said claims that refunding warrants could nevertheless be issued to pay the temporary loan. These holdings were based on the theory that the obligation was merely changed in form and not extinguished. **Quarterly Report of the Attorney General**, Vol. II, page 138; **Quarterly Report of the Attorney General**, Vol. IV, page 12; **Quarterly Report of the Attorney General**, Vol. VI, page 151. Reasoning by analogy the same principle will apply to advances made from the General Fund which were used to pay said outstanding claims. Therefore, in my opinion, if the money was actually advanced from the General Fund to pay said outstanding claims and said claims were not merely paid from the General Fund directly, refunding warrants may now be issued to replace the monies advanced from the General Fund.

This opinion is distinguished from the opinion rendered to you on March 16, 1937 (**Quarterly Report of the Attorney General**, Volume VI,

page 151, supra) in that, under the present facts the money was advanced from the General Fund, whereas, under the facts in said former opinion the obligations were paid directly from the General Fund, thereby extinguishing the debt and not merely changing its form as in the instant case.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 22, 1937

Hon. O. L. Bethune,
Tax Assessor,
DeKalb County,
Fort Payne, Alabama.

Taxation—Homestead Exemption—Act 107, General Acts of 1936-37, p. 113.

Homestead exemption from 1936-37 State taxes may be asserted and credit given therefor after October 1, 1937, and before tax collector invokes machinery of the State to enforce tax collections.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry as follows:

“Are we to issue Homestead Exemption to home owners to apply on 1937 taxes after the tax year expires which is October 1, 1937?”

It is my opinion that a taxpayer may assert his homestead exemption from 1936-37 State taxes and receive credit therefor after October 1, 1937, and before the tax collector invokes the machinery of the State to enforce ad valorem tax collections.

In an opinion of this office to Hon. Madison L. Smith, Tax Assessor, Washington County, Chatom, Alabama, dated October 5, 1937, I held that Act No. 107, General Acts of 1936-37, p. 113, granting Homestead exemptions, is not self-executing, and that the taxpayer is required to assert his claim for a homestead exemption. No mention was made in this opinion, because the question was not asked, as to when the taxpayer would be barred from asserting a claim of homestead exemption from payment of taxes due the State for the tax year 1936-1937.

The reasoning set forth in the opinion to Mr. Smith is pertinent to this opinion. In addition to the inference to be drawn from the Home-

stead Act that the Legislature intended for the taxpayer to perform an assertive act in pursuit of the gratuity offered in the form of a homestead exemption from the payment of State taxes, I think also that an inference may be drawn that the legislature intended for the assertive act to be executed within a reasonable time. Certainly, the legislature did not intend for the taxpayer to have an indefinite time within which to assert his claim for a homestead exemption from the payment of state taxes for the year 1936-1937.

What shall constitute a reasonable time within the intent of the legislature is a question of prime importance to the State of Alabama and to the taxpayer. The same legislature that enacted the Homestead Exemption Act also adopted or passed a General Revenue Act and fixed therein a time limit for the payment of ad valorem taxes. It may be reasonably presumed that the legislature intended to give the taxpayer a reasonable time within which to pay his taxes without the addition of expense for foreclosure thereof. It is my opinion that one may reasonably look to the time limit prescribed by the legislature for the payment of taxes without additional expenses being attached thereto, as a criterion for the assertion of a claim to homestead exemption. I think a logical inference may be drawn from such time limit that the legislature intended such time as reasonable for the assertion of a homestead claim. Therefore, I conclude that it was the intention of the legislature that the taxpayer, to avoid a forfeiture, may assert his homestead exemption from the payment of 1936-37 taxes after October 1, 1937, but not after the tax collector has invoked the machinery of the state to collect the ad valorem taxes for such year. This opinion is limited to homestead exemption from payment of state taxes for the tax year 1936-37.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 25, 1937

Hon. Henry S. Long,
State Tax Commission,
Montgomery, Alabama.

Mileage Tax—State lien for unpaid mileage tax due by operator of motor vehicle is superior to the lien of the purchase money mortgage on the vehicle, even though such mortgage was properly executed and recorded at the time of the purchase.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I wish to acknowledge receipt of your letter of August 2, 1937, as follows:

"We have a truck attached for Mileage Tax of an operator which tax is past due and delinquent.

"The International Harvester Company sets up a claim of \$450.00 due them on this truck. Claim of International Harvester Company is for balance due them on purchase price of this truck as shown by mortgage properly executed and recorded."

I am of the opinion that the State's claim for past due mileage tax is superior to the purchase money mortgage.

Under the provisions of Schedule 158.21 of the 1935 Revenue Act, the "Alabama Motor Carrier Act of 1931" approved June 19, 1931, was re-enacted. Said Act of 1931, page 309, reads as follows:

"The State shall have a lien upon all of the property in this State of any motor transportation company for the payment of the mileage tax provided by this Act and the fees and penalties of this section, provided for, **which lien shall be superior to all other liens, except a lien for State, County and Municipal Taxes.**"

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 27, 1937

Hon. E. T. Carpenter,
Clerk of the Circuit Court,
Washington County,
Chatom, Alabama.

Attention Mr. Carpenter—

Circuit Clerks entitled to fee of \$.15 per one hundred words, for record for the Supreme Court, in a case where the defendant is convicted in the Circuit Court and appeals to the Supreme Court of Alabama, such fee to be collected, in case of defendant being ultimately acquitted, from the fine and forfeiture fund of the county; provided, however, that fees of state witnesses shall have priority over such fee of Circuit Clerk. Sections 3739 and 3740 of the Code of Alabama, 1923 and General Acts of Alabama, Regular Session 1931 (H. 673) p. 331.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 14, 1937, requesting my opinion as follows:

"We have a case that was tried in Circuit Court and the defendant found guilty. The defendant appealed his case to Supreme Court and the Supreme Court reversed the case. The second time that the defendant was tried he was found not guilty has the Clerk any authority to collect for making the transcript to Supreme Court. Please advise in what way the Clerk can collect for making the transcript to Supreme Court."

Answering the inquiry, contained in your letter above set out, the Circuit Clerk does, in my opinion, have authority, in a criminal case, to collect for making a transcript to the Supreme Court on appeal.

Section 3739 of the Code of Alabama, 1923, as the same is amended by House Bill 673, General Acts of Alabama, Regular Session, 1931, provides the services for which Circuit Clerks are entitled to fees in criminal cases, and the amount of such respective fees; and, among other things, it is provided, as follows:

"Record for Supreme Court, for each 100 words—\$.15."

Section 3740 of the Code of Alabama, 1923, providing for the taxing and collecting of such fees, provides among other things, as follows:

"and in all trials in the Circuit Courts, or County Courts, where the state fails to convict, or the indictment abates, or is nol prossed, or withdrawn, the fees of the Sheriffs and Clerks of the Courts shall be paid out of the fine and forfeiture fund; but the Sheriffs and Clerks must make affidavit before the Circuit, or Probate Judge of the amount due them; and the right of the Sheriffs and Clerks to such payment of their fees shall be postponed to the rights of State Witnesses, as they now exist."

In view of the law governing fees to which Clerks of the Circuit Courts are entitled, and the manner of taxing and collecting the same, as above quoted, I am of the opinion that, under the circumstances set out in your letter, the Clerk of the Circuit Court would be entitled to a fee for making a transcript of record on appeal to the Supreme Court, the amount of the same to be determined on a basis of \$.15 per 100 words; and that, also, the said Clerk would be entitled to have the same paid out of the County fine and forfeiture fund, provided, however, that he would not be entitled to such payment from said fund so long as any State Witness fees remained outstanding and unpaid against the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 28, 1937

Hon. H. A. Terry,
Judge of Probate,
Hale County,
Greensboro, Alabama.

1. An appearance bond in a criminal case on forfeiture makes the principal and sureties liable only for not exceeding the amount of the bond and the costs of the forfeiture.

2. The minutes of the county court are legal if made on a printed form, that is, partly printed and partly written.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 10, 1937, in which you request my opinion as follows:

"I should appreciate it very much if you would give me an opinion on the following case:

"How much of the accrued cost can the sureties on a bond be held liable for when a bond forfeiture is made final? Are the sureties held liable for the total court cost plus the amount the forfeiture is made final for?

"I should also like to know if minutes of County Court will be legal if kept on a printed form so that only pleadings and sentences will have to be written in."

Answering your first inquiry, the sureties upon an appearance bond in a criminal case can only be made liable in case of forfeiture for the amount of the bond and the costs of the forfeiture. You will note an appearance bond only guarantees the appearance of the defendant in court on the date the case is set for trial, and from term to term until discharged by law. I call your attention to Section 3382, Code of Alabama 1923, which is as follows:

"Section 3382. Effect of undertaking; to what extent binds parties thereto.—The undertaking of bail binds the parties thereto, jointly and severally, for the appearance of the defendant on the day fixed in the bond or undertaking, from day to day of such session, and from day to day of each session thereafter, until he is discharged by law; and, if the trial is removed to another county, for the appearance of the defendant from day to day of each session of the court to which it is removed until discharged by law."

Peck v. State, 63 Ala. 201, 2nd Enc. Dig. 149; **State v. Crosby**, 114 Ala. 11, (22 So. 110).

My answer to your second inquiry is in the affirmative. I call your attention to Section 1, Code of Alabama 1928, (Michie), which is in part as follows:

"Section 1. Signification of words.—Words used in this * * * the word "writing" includes typewriting and printing on paper; * * *."

Carter v. Tennessee Coal, Iron & Ry. Co., 61 So. 65.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 29, 1937

Hon. Frank M. Johnson,
Judge of Probate,
Winston County,
Double Springs, Alabama.

Of \$5.00 collected under Act to regulate selling of motor vehicles by non-residents (p. 263, 1936-37 General Acts), probate judge authorized to retain \$.50 and pay balance into the school fund.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of October 7, 1937, as follows:

"In Section 2 of an Act, No. 220, H. 45, Poole, we find among other things, when the applicant registering used cars, files his bond and pays the Probate Judge \$1.00 for recording fee, he is then to pay \$5.00, WHICH SAID SUM SHALL BE BY THE PROBATE JUDGE PAID OVER TO THE COUNTY TREASURY OF THE RESPECTIVE COUNTIES, LESS A FEE OF .50c TO BE RETAINED BY THE PROBATE JUDGE TO THE CREDIT OF THE COUNTY SCHOOL FUNDS, THE SAME TO BE DISTRIBUTED AND DISPOSED OF AS PROVIDED BY LAW.

"Is the \$4.50 to be paid to the General Fund of the County and the 50 cents to the credit of the school fund, or is the \$4.50 to be paid into the school fund and the 50 cents retained by the Probate Judge as his personal fee?

"We would like to have your opinion on the above question, the way it reads it seems that the \$4.50 goes to the county treasury and the 50 cents to the school funds, but, it is not made clear. Will thank you very much for your opinion."

I am of the opinion that under the provision which you mention (1936-37 Acts, page 263), fifty cents should be retained by the probate judge as his personal fee and \$4.50 should be paid into the school fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 2, 1937

Hon. C. E. McNatt,
Circuit Court Clerk and Ex-Officio Clerk,
Law and Equity Court, Franklin County,
Russellville, Alabama.

1. When the prosecutor becomes a witness for the state in a criminal case he is entitled to his per diem and mileage as a witness.

2. When the sheriff or his deputies are summoned as witnesses for the state in a criminal prosecution, such sheriff or deputy is entitled to his per diem and mileage as such witness.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 19, 1937, in which you request my opinion as follows:

"John Smith is not an officer of any kind but is a private citizen of the county. John Smith appeared before the Clerk of the Law & Equity Court and commenced a prosecution by making a proper affidavit charging Bill Jones with public drunkenness. The clerk of the Law and Equity Court issued a warrant of arrest on this affidavit and the public drunkenness case was placed in the trial docket for trial. The said John Smith who commenced the prosecution was summoned as a state witness. A subpoena was issued for Smith by the clerk and was served by the sheriff. Smith appeared as a witness for the state.

"Inasmuch as Smith was the prosecutor who commenced the prosecution, is he entitled to draw pay as a state witness? Also is a sheriff or deputy sheriff who starts a prosecution entitled to pay as a state witness?

My answer to both of your inquiries is in the affirmative. The fact that the prosecutor becomes a witness of the state on the trial of the defendant does not bar him from receiving pay as such witness.

This office has held that when the sheriff or his deputies are summoned as witnesses for the state in a criminal case, they are entitled to their per diem and mileage.

I am enclosing herewith the opinion referred to above written to Hon. Howard Kirby, Clerk, Circuit Court, Gadsden, Alabama under date of July 12, 1935.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 8, 1937

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Alabama Cooperatives' Financing Corporation, Inc., an agency of the United States Government, not subject to mortgage privilege recording tax.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt in today's mail of a letter from you which is as follows:

"I have had presented to me for recording a paper executed by Alabama Cooperative industries, Inc. Group No. 5, of Greenville, Alabama, to Alabama Cooperatives' Financing Corporation, Inc., of Montgomery, Alabama, copy of which is attached hereto.

"I am informed that the paper secures a loan of Federal Relief Funds advanced to this group with which to pay labor, operating expenses, etc., and that the lending agency was set up by the Alabama Relief Administration for the express purpose of handling the Federal Funds, because it was known that the Alabama Relief Administration would soon close up and then this agency, incorporated as a non-profit corporation, would continue to operate and handle these funds to a conclusion.

"I shall appreciate receiving your opinion as to whether the paper, copy of which is attached, requires the payment of a mortgage tax for recording."

From the facts set out in your letter, I am of the opinion that the Alabama Cooperatives' Financing Corporation, Inc., is an agency of the United States Government, and as such is not liable for the mortgage privilege tax.

I refer you to an opinion of this office written to the Probate Judge of Pike County on June 29, 1934. Biennial Report 1932-34, page 593.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Board of Revenue,
Barbour County,
Clayton, Alabama.

November 9, 1937

Board of Revenue can legally appropriate county funds to install and maintain an exhibit of the agricultural resources of the county.

Opinion by Assistant Attorney General Lawson.

Gentlemen:

This is to acknowledge receipt of a letter under date of November 5, 1937, from Messrs. McDowell & McDowell, attorney for the Board of Revenue of Barbour County, which is as follows:

"The Parent Teachers Association of Clayton, Barbour County, Alabama, have inaugurated a plan to maintain an exhibit of the agricultural resources of Barbour County at a **County-wide agricultural Fair** to be held in the City of Clayton—the county seat of Barbour County—during the week beginning November the 8th next, and to encourage the general agricultural interest of the people of this County, wherein more interest will be taken by our people in the future, than they have manifested in the past.

"To that end the Parent Teachers Association of Clayton have petitioned the Board of Revenue of Barbour County to donate to the said Parent Teachers Association the sum of Fifty Dollars out of monies in the Treasury of the County, not otherwise appropriated for the purposes aforesaid. The Board of Revenue is in sympathy with the movement, and desires to comply with the request of the said Association—if in the opinion of the Attorney General—it can be legally done. As County Attorneys we are directed to request an opinion from you as to the legality. In our opinion the Board of Revenue is permitted under Subdivision 12 of Section 6755 of the Code of Alabama of 1923 this expenditure for the purposes hereinabove set forth, and we trust that it meets the approval of the Attorney General's office."

I am of the opinion that your inquiry should be answered in the affirmative. Subdivision 12 and 23 of Section 6755, Code of Alabama, 1923, as amended, provide as follows:

"12. To make an appropriation, in no case to exceed seven hundred and fifty dollars per year, to install and maintain an exhibit of the agricultural and mineral resources of their respective counties.

"23. To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

In my judgment, the above statutory provisions are express authority for the appropriation by the county governing body of county funds for such purposes as mentioned in your letter.

I refer you to an opinion of this office rendered on September 8, 1927, to Hon. T. B. White, Clerk, Board of Revenue of Sumter County, which opinion authorizes such an appropriation (Biennial Report of Attorney General 1926-28, page 279).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 10, 1937

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Commissioners' Court—

1. Hospitalization of indigents in County may be provided for by County Board of Public Welfare, not inconsistent with the rules and regulations of the State Board.

2. Court of County Commissioners may make appropriations for County welfare work, including hospitalization of indigents.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 25, 1937, as follows:

"We have in the county from time to time indigents who need hospital care and no means of paying for it.

"Will you please advise if the county can pay hospital bills of this nature to a hospital located in the county, the population of the county being less than 25,000."

Act No. 332, General Acts 1935, page 762, sets up a system of unified welfare activities and agencies in the State, counties and municipalities. Section 13 of said Act provides in part as follows:

"All administrative and executive duties and responsibilities of the County Department not inconsistent with the rules and regulations of the State Board shall be performed by the County Director, subject to the approval of the County Board. These duties and responsibilities shall include relief to persons in need of assistance," etc.

The hospitalization of indigents in the County is included in the phrase "relief to persons in need of assistance." The method of working out such hospitalization is within the control of the County Department of Public Welfare, which must not be inconsistent with the rules of the State Board of Public Welfare.

Section 14 of said Act provides for appropriations to be made by the Court of County Commissioners, or other governing body of the county, as follows:

"The County Board of Revenue, Court of County Commissioners, or other governing body of the County and incorporated municipalities within the county shall make joint appropriations for office space, supplies, and for the maintenance of the functions to be performed by the County Department of the Public Welfare, and shall mutually partici-

pate in the benefits thereof, but the amount to be appropriated by said governing body of the county and by each municipality shall be subject to approval of the said governing body of the county and the participating municipality or municipalities."

The Court of County Commissioners, or other governing body of the county shall make appropriations for the program of services. And the method of performing the services, including hospitalization of indigents, is a matter for the determination of the County Department of Public Welfare, in cooperation with and not inconsistent with the rules and regulations of the State Department of Public Welfare.

For further information, generally, concerning the status of the County Department of Public Welfare and the Court of County Commissioners with reference to public welfare work, you may see Quarterly Report of the Attorney General, Vol. III, page 97, also Opinion addressed to Dr. J. N. Baker, State Health Officer, on August 14, 1937, and to Hon. M. T. Maxwell, Secretary and Purchasing Agent, Board of Revenue, Tuscaloosa County, on July 2, 1937.

The Court of County Commissioners is not authorized to pay directly to hospitals located in the county, for hospitalization of indigents, independently of the above.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 12, 1937

Hon. J. Eugene Foster,
General Counsel,
Unemployment Compensation Commission,
Montgomery, Alabama.

Unemployment Compensation Act—

Section 2(f), as amended, in so far as it treats all business enterprises actually having a common majority ownership or control as one employer, for the purpose of the Act, does not unconstitutionally discriminate against either the employees or the employers involved in such business enterprises nor deny them the equal protection of the law.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I have your letter of June 21, 1937, which reads as follows:

"Please give us your opinion on the following questions, based upon the following facts;

"Mr. Harry Maring, of Selma, Alabama, owns four fifths interest in the Southern Clothing and Notions Company which is a partnership, the other partner owning one-fifth interest. Mr. Maring also owns the entire interest in a store at Robertsedale, Alabama, known as the M and F Store, and a store by the same name at Foley, Alabama. The Southern Clothing and Notions Company employs less than seven employees. The M and F Store at Robertsedale employs not more than three persons, and the M and F Store at Foley employs three or less people. The employees of all three stores combined total more than eight. These persons worked in these three stores for more than twenty weeks during the years 1935 and 1936.

"Part of Section 2 (f) of the Alabama Unemployment Compensation Law provides as follows:

"'Moreover, that where any person, partnership—has a majority control or ownership of otherwise separate business enterprises employing persons in the State, all such enterprises shall be treated as a single employer' for the purposes of this Act."

"In view of the above facts, and the above excerpt from Section 2 (f) of the Alabama Unemployment Compensation Act we ask your opinion:

"1. Whether or not, under the facts stated, the employees of Southern Clothing and Notions Company would be liable for taxes against employees under the provisions of the law, if constitutional;

"2. If the letter of the law would make these employees liable for the taxes, would not such proviso be unconstitutional as creating undue discrimination against an employee at Foley who would not owe the tax if he was working for a person similarly situated like Mr. Maring;

"3. Whether or not there is an undue discrimination in the law against Mr. Maring's partner in Southern Clothing and Notions Company by reason of the fact that a competing business with less than eight employees with a partner not interested in any outside business would not owe the tax, whereas, if one of the partners is interested in outside business, the Southern Clothing and Notions Company would have to pay the tax, although less than eight employees were employed;

"4. If Mr. Maring only owned 50% of the Southern Clothing and Notions Company, and would thereby be exempt from taxes, is this not a discrimination against a partner in such business where his other partner owns more than fifty percent of the business."

In answer to your first inquiry it is my opinion that the employees of the Southern Clothing and Notions Company are, under the facts stated, liable for taxes against employees levied by the Alabama Unemployment Compensation Act, Act No. 447, General Acts 1935, page 950, as amended by Acts No. 156, No. 194, No. 195, General Acts 1936, pp. 176, 225 and 228. The provision to which you refer, after particularly defining the term "employer", provides:—

"2 (f) * * * provided, moreover, that where any person, partnership, association, corporation, whether domestic or foreign, or the legal repre-

sentative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person, either directly or through a holding company or otherwise, **has a majority control or ownership of otherwise separate business enterprises** employing persons in the state, all such enterprises shall be treated as a single 'employer' for the purposes of this Act. Any employer subject to this Act shall cease to be subject hereto only upon a written application by him after a finding by the commission that he has not within any calendar week within the last completed calendar year employed **eight or more persons** in employment subject hereto. Any employer (of any person within the State) not otherwise subject to this Act shall become fully subject hereto, upon filing by such employer with the commission of his election to become fully subject hereto for not less than two calendar years, subject to written approval of such election by the commission."

The constitutionality of this Act has been upheld by the Supreme Court of Alabama in the case of **Beeland Wholesale Company v. Kaufman, Chairman, Alabama Unemployment Compensation Commission**, 174 So. 516, and by the Supreme Court of the United States in **Albert A. Carmichael et al v. Southern Coal & Coke Company—L. Ed.**

You also inquire if there is a denial of the equal protection of the law to co-employees and the other employer by reason of this definition. I think not.

In upholding the validity of this Act, the Supreme Court of the United States, in the Southern Coal & Coke case, said:

"It is inherent in the exercise of the power to tax that a State be free to select the subject of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a State any rigid rule of equality of taxation. This court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation * * *.

"Like considerations govern exemptions from the operation of a tax imposed on members of a class. A legislature is not bound to tax every member of a class or none. It may make distinction of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. * * *

"Distinctions in degree stated in terms of difference in number, have often been the target of attack, see *Booth v. Indiana*, 237 U. S. 391. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competence is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not. * * *"

And with reference to discriminations against employees,

"Special complaint is made of the discrimination against those with only six co-workers as contrasted with those who have more. We have already shown that a distinction in terms of the number of employees is not on its face invalid. * * *"

Touching the many questions urged concerning discriminations against employees, the Supreme Court of Alabama in the Beeland Wholesale Company case, *supra*, said of the Act:

"We think it is within the State's police power, not limited by Section 13, because the purpose is public, And that there is no arbitrary or capricious or unequal classification either as applied to employers or employees."

The purpose of the legislature in treating all business enterprises actually having a common majority ownership or control as one employer, for the purposes of that act, would appear obvious. Otherwise, each department of a given business might be so separately incorporated or organized, or groups of machines in factories be so separately incorporated or organized that the purpose of the law be artificially defeated. To control a business is to control its employment policies and activities. The legislature could have so reasoned.

In view of these decisions and considerations, I therefore hold, in answer to your second, third and fourth questions, that the provisions of the Act which treat all business enterprises actually having a common majority ownership or control as one employer, for the purposes of the Act, does not unconstitutionally discriminate against either the employees or the employers involved in such business enterprises nor deny them the equal protection of the law.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 15, 1937

Hon. J. A. Carnley,
Probate Judge,
Coffee County,
Enterprise, Alabama.

Licenses—Beauty Parlors—

1. Beauty parlor operator required to procure shop license measured by number of operators or students charging for labor.
2. Shop license covers work done by owner, who need not procure operator's license.
3. Beauty parlor licenses required to show only name of shop and total number of operators or students.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter in which you request my opinion as follows:

"I will thank you to advise me as to what is the proper license to collect from a beauty shop located here that also operates a school in beauty shop work.

"Also, please advise whether the operator of the shop should pay one license to cover the shop and all her assistants including student assistants, or should she take out a shop license and a separate license for each operator or student, and does the shop license cover work done by the owner or must she have an operator's license, and addition to the shop license.

"Also, please state whether or not the license or licenses to be issued should show the name of the shop and the name of each operator or student or should it simply show the name of the shop and the total number of operators or students covered thereby.

"Also, please state whether or not the shop is liable for its license including that of each operator and student, or is each such student or operator personally liable for such license."

In answer to your inquiry whether the operator of a shop should pay one license to cover the beauty shop and all the assistants, including student assistants, or whether a shop license and a separate license for each operator or student should be procured, it is my opinion that the operator of a beauty parlor is required by Schedule 21 of the General Revenue Laws of 1935 (Simon's Compilation, page 225) to procure a license for her shop, which said license will be in the amount of ten dollars (\$10.00), and that for each operator in such shop there shall be added to the amount of ten dollars either six dollars (\$6.00) or four dollars (\$4.00), depending upon the size of the city in which the beauty parlor is located. This conclusion is based upon the fact that the license imposed by Schedule 21 is a privilege license for operating the business of a beauty parlor and is measured by the number of operators employed in hairdressing, facial treatments, manicuring, hairwaving, etc. in such beauty parlor.

You do not state in your letter whether or not the students in the beauty shop described by you "engage in beauty parlor work for which a charge is made or material used is charged therefor." Schedule 21 provides as follows:

"SCHEDULE 21. Each person operating what is generally known as a BEAUTY PARLOR, or other place where hair dressing, facial treatments, manicuring, or hair waving is done shall pay a license of ten dollars (\$10.00) and for each operator so employed as follows:

"In cities of more than 60,000 inhabitants \$6.00

In cities of less than 60,000 inhabitants and all other
places whether incorporated or not 4.00

"This schedule of fees shall apply to beauty parlor colleges where said colleges engage in beauty parlor work for which a charge is made or material used is charged therefor."

If the student, under the facts detailed by you, "engage in beauty parlor work for which a charge is made or material used is charged therefor", then the party operating the beauty parlor should procure a license measured by the number of students so operating in said shop, as above described. However, if no charge is made by the students or the operator either for the work or for the material used, then the license required of such beauty parlor owner would be only the ten dollars mentioned in Schedule 21, plus the amount charged for each non-student operator.

In answer to your inquiry whether or not the shop license covers work done by the owner, I wish to advise you that it is my opinion that Schedule 21 unmistakably allows the owner of the beauty parlor to engage in hair dressing, facial treatments, manicuring, etc., upon the payment of the shop license of ten dollars. There is no requirement for an additional license for such owner.

Inasmuch as it has been held hereinabove that the license imposed by Schedule 21 is upon the **business** of operating a beauty shop, measured by the number of operators, it is my opinion that the license issued should show the name of the shop and the total number of operators or students, there being no necessity for showing the name of each student or operator.

For the same reason, that is, that the license is a **business** license, the owner or operator of the shop and not the students or operators working therein is required to procure the license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 15, 1937

Hon. R. L. Almon,
County Solicitor,
Lawrence County,
Moulton, Alabama.

Intoxicating Liquors—Suspension of Sentence—

1. The various Judges of the Courts trying violations of the prohibition law must, on the second and subsequent convictions, under Section 4621 of the Code of Alabama, 1923, impose hard labor punishment, provided the fact of prior conviction is properly pleaded as provided in Section 4644 of the Code of Alabama, 1923, and is proven.

2. Judges of the various Courts of Alabama have no authority to suspend sentences imposed in accordance with the provisions of

that portion of Section 4622 which makes it mandatory upon the Court to impose hard labor punishment for second, and all subsequent, convictions.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter in which you request my opinion as follows:

"1. Does a trial judge have jurisdiction to try cases for a violation of the prohibition laws have the authority to impose only a fine for the second conviction?

"2. In the event you hold that he does not have such authority, does such judge have the authority after he imposes the hard labor sentence, to suspend such hard labor sentence during good behavior or otherwise prevent the execution of that penalty?"

Answering your first inquiry, your attention is called to Section 4644 of the Code of Alabama, 1923, which provides, among other things, as follows:

"* * * and in any prosecution for a second or subsequent offense it shall not be requisite to set forth in the indictment, information, complaint or affidavit, the record of the former conviction, but it shall be sufficient briefly to allege such conviction, * * *"

Also, your attention is called to that portion of Section 4622 of the Code of Alabama, 1923, providing for sentences in cases of second or subsequent convictions for violations of Section 4621 of the 1923 Code, as follows:

"* * * and, on second conviction of a violation of said Code Section 4621, the offense shall, in addition to a fine within the limits above named, be punishable by confinement at hard labor for the county for not less than three months nor more than six months to be imposed by the court or judge trying the case; and on the third and every subsequent conviction of a violation of said Code Section 4621, the offense shall, in addition to a fine within the limits above named, be punishable by confinement at hard labor for the county for not less than six months nor more than twelve months."

From the above quotations, it will be seen that, in the case of second or subsequent convictions for violation of the provisions of Section 4621, it is made mandatory upon the Judge trying the case to impose hard labor punishment. The punishment to be imposed, in case of second conviction, is a sentence to confinement at hard labor for the county for not less than three months nor more than six months; and the punishment to be imposed, in the case of third and every subsequent conviction, is a sentence to confinement at hard labor for the county for not less than six months nor more than twelve months. However, unless the prior conviction or convictions, under the terms of Section 4621, are properly pleaded and proven, in accordance with the terms of said Section 4644, then, there would be no occasion for the application of the above quoted portion of Section 4622,

and it would not be mandatory upon the court to impose hard labor punishment.

In view of the above, it is my opinion that a trial judge having jurisdiction to try cases for violation of the prohibition laws would be required to impose only a fine for second or subsequent convictions, provided such second or subsequent convictions were not properly pleaded and proven. Of course, the Judge might, in his discretion, impose additional hard labor. But, in case such second or subsequent convictions were properly pleaded and proven, then such judge would not be authorized to impose, as a punishment only a fine as, in such case, the imposition of hard labor punishment would be mandatory upon him.

As to the necessity for pleading and proving second or subsequent convictions, to make the terms of Section 4622, relative thereto, applicable you are referred to the following cases:

Ex Parte State Ex Rel. Davis Atty. Gen. Brown vs. State, 90 So. 278 (second case) Hill vs. State, 167 So. 606.

Your second inquiry must be answered in the negative. Your attention is called to Section 4625 of the Code of Alabama, 1923, as follows:

"Suspension of sentence for violating prohibition laws regulated.—No judge of any court shall have authority to suspend sentence in whole or in part upon the conviction of any person or persons in his court of any offense against the laws of the State of Alabama for the promotion of temperance or for the suppression of the evils of intemperance, except in cases authorized and prescribed by existing laws. It shall be the duty of such judge, upon the conviction of any such offense of any person or persons, to pronounce and have enforced and executed the sentence of the law due to a convicted person in such cases. Any action upon the part of a trial judge of any court for the purpose of preventing or delaying the execution of the penalty of the law, by suspending sentence or withholding sentence for the purpose of preventing its execution, shall be null and void and constitute a high misdemeanor in office."

It is true that, at the time of the enactment of the law which is now Section 4625, there existed another Section, namely, Section 5284 of the Code of Alabama, 1923, which is as follows:

"Punishment by imprisonment in county jail or at hard labor for county, sentence for suspended or remitted.—When the Court imposes additional punishment where a fine has been assessed by a jury, or in any case where the court is authorized to impose such punishment at imprisonment in the county jail or at hard labor for the county, the court may, in its discretion, suspend the execution of such sentence until a subsequent term of the court and may then order it to be executed or remit the same, or further suspend the execution of the sentence."

This last quoted section has been considered by the Court of Appeals of Alabama, and by the Supreme Court of Alabama on Certiorari, on the question of its constitutionality; and the same was held to be constitutional

Barnett v. State, 18 Ala. App. 246, 90 So. 13, Cert. den., 206 Ala. 698, 90 So. 925; **Clark v. State**, 20 Ala. App. 472, 102 So. 916.

I have taken into consideration the case of **Montgomery v. State**, 231 Ala. 1, 163 So. 365, Cert. Den., 231 Ala. 41, 163 So. 377, in which the Supreme Court, upon certified questions submitted to it by the Court of Appeals of Alabama, held unconstitutional the Act of 1932, Extra Session, p. 54, authorizing the trial courts to suspend sentences in certain cases as being in violation of Sections 43 and 124 of the Constitution of Alabama of 1901. This case involved an Act whose provisions were more extensive than the provisions of Section 5284, Code, above quoted.

The effect of Section 5284, *supra*, is to authorize the trial judge or court to impose additional punishment conditionally, that is to say, to authorize the inclusion of the additional punishment in the judgment, but to let the matter remain in fieri until a subsequent term at which time the judge or court may finally determine whether or not such additional punishment shall be imposed. The decision in the *Montgomery* cases, *supra*, does not purport to hold that the legislature constitutionally may not invest the courts with such authority.

However, Section 4622 of the Code expressly makes the hard labor provided therein a mandatory part of the punishment to be imposed. It is in no sense "additional punishment" which may or may not be imposed by the court or judge at his discretion. Section 4625 does not apply to such mandatory hard labor sentence.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 16, 1937

Hon. D. E. Dunn,
Assistant Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. Possession of stamped and/or identified alcoholic beverages, other than malt or brewed beverages, i. e., alcoholic beverages, other than malt or brewed beverages, purchased in accordance with the provision of the Alabama Beverage Control Act, in a cafe, filling station or night club in a wet county, which said cafe, filling station or night club does not have a license to sell any alcoholic beverages, other than malt or brewed beverages, is *prima facie* evidence that the same are possessed for sale or distribution with the intent to sell or distribute the same contrary to law.

2. Agents of the Alabama Alcoholic Beverage Control Board or other duly authorized officers are legally justified in seizing such

alcoholic beverage referred to in Sub-section 1, when possessed in the manner there detailed, in a wet county, and arresting the proprietor of such a place on a charge of selling, offering to sell or illegally having in possession, alcoholic beverages contrary to law.

3. In such a case, if there is no conviction, the alcoholic beverages so seized should be returned to the person from whom they are seized and the officer seizing the same would incur no liability on his official bond.

4. Likewise, if there is a conviction, the alcoholic beverages so seized should be disposed of in accordance with the appropriate provisions of Article 11, Section 167, Code of Alabama, 1923.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 4, 1937, which follows:

"I have before me a copy of your opinion addressed to Hon. J. Sam Cleiland, Sheriff of Clarke County, on July 29, 1937.

"Throughout this opinion reference is made to Clarke County which of course is a dry county, but we have a similar situation which has arisen in a wet county. In several wet counties there are filling stations, cafes and night clubs, none of which have a license to sell any alcoholic beverage other than beer, and none of which is used exclusively as a dwelling house. However, at these places there is kept, and I have reason to believe sold, although I may not be able to prove the sale, alcoholic beverages other than beer.

"1. Is the possession of wine or whiskey under the above circumstances prima facie evidence of a sale or keeping for sale of said wine or whiskey by a person not licensed to sell any alcoholic beverage other than beer?

"2. On the above facts, would the agents of the Alabama Alcoholic Beverage Control Board or other officers, be legally justified in seizing such wine or whiskey and arresting the proprietor of such a place of business on the charge of selling, offering for sale or illegally having in possession, prohibited liquors and beverages contrary to law?

"3. If there is no conviction, should such wine or whiskey be returned to the owner and in that event, would the agent or officer seizing same, be free from liability on his official bond?

"4. Upon conviction, what disposition should be made of the wine or whiskey so seized?"

As you know, the possession of unstamped and/or unidentified alcoholic beverages, i. e., alcoholic beverages not purchased in accordance with the provisions of the Alabama Beverage Control Act, is illegal anywhere in

the State of Alabama, in either a wet or dry county. See opinion of the Attorney General to Hon. H. E. Dick Burrows, Sheriff, Walker County, Jasper, Alabama, under date of April 3, 1937, and the provisions of Sections 51 and 61 of the Alabama Beverage Control Act, cited and quoted in the last part thereof.

Therefore, I presume from your letter of inquiry that the question you propound therein concern stamped and/or identified alcoholic beverages, other than malt or brewed beverages, i. e., alcoholic beverages, other than malt or brewed beverages, purchased in accordance with the provisions of the Alabama Beverage Control Act. Upon such an assumption, I shall deal with your questions in seriatim.

1. You first asked whether the possession of alcoholic beverages, other than malt or brewed beverages, in a filling station, cafe or night club, which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages, in a wet county, is prima facie evidence of the sale or keeping for sale, or illegally having in possession, such alcoholic beverages contrary to law.

In my opinion, your question should be answered in the affirmative.

In the opinion of this office to Hon. Festus M. Shamblin, Sheriff, Tuscaloosa County, Tuscaloosa, Alabama, under the date of May 29, 1937, which opinion is cited and quoted from in opinion to Sheriff Cleland, to which you refer in your letter of inquiry, this office held as follows:

"Section 4685, Code of 1923, to which you refer reads as follows:

"'Section 4685. Keeping of liquors prima facie evidence.—The keeping of liquors or beverages that are prohibited by the law of the state to be manufactured, sold or otherwise disposed of, in any building not used exclusively for a dwelling shall be prima facie evidence that they are kept for sale, or with intent to sell the same, contrary to law.'

"I am of the opinion that the keeping of legally purchased alcoholic beverages of any kind in an eating establishment or cafe would amount to prima facie evidence that same were kept for sale or distribution, or with the intent that they be sold or distributed contrary to law. The Legislature in Section 4685 has declared a rule of evidence, which it had power to do. *Fitzpatrick vs. State*, 169 Ala. 1, 53 So. 1031. I find nothing in the Alabama Beverage Control Act which repeals this provision in dry counties."

Just as there is nothing in the Alabama Beverage Control Act which repeals Section 4685, supra, in dry counties, there is nothing in said Act which repeals said section in a wet county, insofar as the provisions thereof apply to the keeping of alcoholic beverages, other than malt or brewed beverages, in a filling station, cafe or night club which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages. Since the Alabama Beverage Control Act only repeals the provisions of the old prohibition laws of this State, of which Section 4685, supra, is a part, to the extent of the conflict, the keeping of stamped and/or identified alcoholic beverages, other than malt or brewed beverages, i. e., alcoholic beverages purchased in accordance with the provisions of the Alabama Beverage

Control Act, in a filling station, cafe or night club in a wet county which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages, is prima facie evidence that the same are there possessed for the purpose of sale or distribution with the intent to sell or distribute the same contrary to law.

2-3. Your second question is whether or not the agents of the Alabama Alcoholic Beverage Control Board or other duly authorized officers would be legally justified in seizing such alcoholic beverages, so possessed, and arresting the proprietor of such a place of business on the charge of selling, offering for sale or illegally having in possession alcoholic beverages contrary to law.

Your third question is whether or not, in such a case, in the event there is no conviction, the alcoholic beverages so seized should be returned to the owner, and whether or not the officer seizing the same would be without liability on his official bond. These two questions will be here answered together.

In the opinion to Sheriff Cleiland, which dealt with similar questions in dry counties, I quoted as follows from the opinion to Sheriff Shamblin, *supra*:

"I am further of the opinion that the sheriff has authority to seize such alcoholic beverages in a dry county, under the above circumstances, and that he would not be liable to the owner of such alcoholic beverages so seized. Of course, the question of whether or not such alcoholic beverages in a dry county were possessed for the purpose of sale or distribution contrary to law is a question of fact for the court or jury, to be determined by all the attendant circumstances.

"If upon a trial of the issues the court or jury, as the case may be, should decide in favor of the defendant, such finding amounting to a legal determination by them that said alcoholic beverages were not possessed for sale or distribution contrary to law, then the possession of same would be legal and the beverages should be returned by the officers to the person or persons from whom seized."

In accordance with the holding hereinabove announced in answer to your first inquiry, these same principles of law laid down in the opinion to Sheriff Shamblin, in regard to a dry county, are equally applicable to possession of such alcoholic beverages, other than malt or brewed beverages, in a filling station, cafe or night club in a wet county which does not have a license to sell any alcoholic beverages, other than malt or brewed beverages.

Therefore, the agents of the Alabama Alcoholic Beverage Control Board or other duly authorized officers will be legally justified in seizing such alcoholic beverages so possessed in a wet county and in arresting the proprietor of such a place of business on the charge of selling, offering for sale or illegally having in possession such alcoholic beverages contrary to law. If there is no conviction, the alcoholic beverages so seized should be returned to the person from whom they were seized and, in that event, the officer seizing the same would be free from liability on his official bond.

4. Your fourth question is as to what procedure should be followed, in such a case, if there is a conviction, in disposing of the alcoholic beverages so seized. In answer to this question, I adopt the language used in the opinion to Sheriff Cleiland in answer to the same question in regard to a similar situation in a dry county:

"In such a case, if the person from whom the beverages are seized is convicted, this conviction amounts to a legal determination that the alcoholic beverages found in his possession and seized from him, though legally purchased, were being illegally possessed for sale or distribution or illegally sold. After such a legal determination, you should proceed to condemn and destroy such alcoholic beverages in accordance with the provisions of the appropriate sections of Article 11 of Chapter 167 of the Code of Alabama, 1923. See opinion of the Attorney General to Hon. D. E. Dunn, Assistant Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of July 29, 1937."

As stated in the opinion to you under date of July 29, 1937, the procedure in regard to the condemnation of such alcoholic beverages is the same in either a wet or a dry county in the State, the sections of the old prohibition laws not having been repealed in this respect by the provisions of the Alabama Beverage Control Act in either a wet or a dry county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 16, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Intoxicating liquors—Sections 4780-4782, Code of Alabama, 1923.

1. Forfeiture of forthcoming bond—Succeeding Sheriff is lawfully authorized to forfeit forthcoming bond.

2. Execution for costs — Register in chancery of jurisdiction in which decree of condemnation was rendered must issue execution against defendant for costs recovered.

3. Execution on forfeited bond—Register in chancery in whose jurisdiction vehicle was condemned must issue execution against defaulting principal and sureties for value of vehicle.

4. Advertising and storage expenses preferred claims—Lawful expenses incurred for storage of contraband vehicle, and for advertising the sale thereof, are preferred claims.

5. Liability of sheriff for costs—Sheriff who has unlawfully released contraband vehicle is not liable for costs of proceedings to condemn such vehicle.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"I herewith respectfully ask that an opinion be rendered relative to the following:

"Condemnation proceedings under Sec. 13, General Acts 1919, where an automobile is sought condemned results in the filing of a valid Replevin Bond with the Sheriff, who, upon approving same, releases the car. Subsequent condemnation hearing by a Circuit Judge results in a declaration of forfeiture and orders the car to be sold according to law by the Sheriff and proceeds distributed according to law. Sureties did not produce the car at time of sale and the then Sheriff did not declare the bond forfeited.

"1. Can a succeeding Sheriff not declare such bond forfeited?

"2. If answer to the above is in the affirmative, may a Register in Chancery (in whose Court the condemnation proceedings were instituted and decree rendered) issue execution for costs in the case?

"3. If the face amount of such forthcoming bond indicates a value in excess of costs in the case, must he issue execution for the value of the property?

"A condemned car is ordered by the Court to be sold by the Sheriff. The costs of the proceedings, exclusive of advertising and storage is in excess of the amount realized through sale. The Sheriff satisfies the storage and advertising in full out of the proceeds of sale.

"4. Is the advertising bill a preferred claim, payable in whole out of the proceeds of sale?

"5. Is the storage bill a preferred claim, payable in whole out of the proceeds of sale?

Sheriff 'A' seizes a car and causes same to be stored. Solicitor institutes condemnation proceedings. Sheriff 'B' takes office before decree is rendered ordering car sold by the Sheriff. Sale is not made by Sheriff 'B' who reports to the Register that the car did not come into his possession.

"6. Under such condition, is Sheriff 'A' liable for costs of the case?

"A seized car, condemned and ordered sold, was released by Sheriff prior to decree upon order of the Solicitor.

"7. Is the Sheriff liable for the unpaid costs in the case?"

It is my opinion that a succeeding sheriff is lawfully authorized to forfeit a forthcoming bond accepted by his predecessor in office for a vehicle which was seized while transporting unlawful liquors or beverages. Section 10189, Code of Alabama, 1923, makes it the duty of a sheriff, "To execute and return the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to him for that purpose, according to law." Such services are pertinent to the office of sheriff and are not personal. Therefore, it is incumbent upon the sheriff to return the bond forfeited even though it was accepted by his predecessor in office.

It is further my opinion that the register in chancery of the jurisdiction in which the suit for condemnation was instituted is lawfully authorized and compelled to issue execution for costs against the unsuccessful defendant in proceedings to condemn a vehicle for transporting unlawful liquors or beverages. Section 7221, Code of Alabama, 1923, provides that, "The successful party in all civil actions is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed by law, or by the judgment of the court." This section further provides that, "The Court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors." In the absence of a decree of the court taxing part of the costs against the State, execution must issue against the unsuccessful defendant for all the costs incurred in said condemnation proceedings.

Answering question number three in your letter, it is my opinion that execution should issue for the value of the car irrespective of the costs. I refer you to Section 4780, Code of Alabama, 1923, which provides that, "Upon the failure of the defendant or claimant to deliver the property condemned within fifteen days after judgment of condemnation the bond (forthcoming bond accepted by the officer authorized to do so) shall be returned forfeited to the register of the circuit court and execution may issue thereon against the principal and his sureties for the amount of the value of such property * * *." The forthcoming bond which is prescribed by Section 4780, supra, and authorized to be accepted by the sheriff in lieu of the property, contains no liability on the part of the sureties for costs. The sureties are bound only by the terms of the bond and are not liable for costs. Therefore, execution against the bondsmen should issue for the lawful value of the car without regard to costs.

Referring to questions four and five of your letter, it is my opinion that the lawful storage and advertising expense for the storage and sale respectively of a contraband vehicle are preferred claims. Section 4782, Code of Alabama, 1923. No lawful duty devolves upon anyone to store a contraband vehicle or to advertise the same for sale without pay therefor. Such duty does devolve upon court officials even though there is no money to pay the fees prescribed by law for services rendered. It is the duty of the sheriff and of the register in chancery to perform official services in connection with proceedings to condemn an automobile even though there would be no fees available. Therefore, I conclude that the expense of storage and advertising should first be paid, and that such was the intent of the Legislature who were cognizant of the duties to which reference has been made hereinabove.

Referring to questions six and seven of your inquiry it is my conclusion that the sheriff, which you mention, is not liable for costs. The vehicle

which he has unlawfully released, if such were the facts, may or may not have been worth the amount of the costs, and consequently the unlawful release thereof by the sheriff may or may not have caused damages to the extent of the costs. Therefore, the costs cannot be taken as a criterion of liability on the part of the sheriff for the unlawful release of the contraband vehicle. Costs are required to be paid from the proceeds of the sale of the condemned vehicle.—Section 4782, *supra*.

The above is not to be construed as holding that the sheriff, in such a case, when he has unlawfully released a vehicle, is without liability therefor, but is to be construed only as holding that the amount of the costs incurred in the proceedings for the condemnation thereof is not the criterion for determining his liability.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 20, 1937

Hon. Henry S. Long, Chairman,
State Tax Commission,
CAPITOL.

License and taxation—Person, firm or corporation engaged in discounting or buying conditional sales contracts etc., employing capital of \$500,000 or more within the State, with offices in more than one county, must pay maximum State license and county license in county in which principal office is located, and thereupon may engage in business in any county in the State without further license. (Schedule 93½, Section 348, Revenue Act of 1935).

Opinion by Assistant Attorney General Rowe.

Attention Mr. Simon:

Dear Sir:

I have your letter of October 4, 1937, requesting my opinion as follows:

"The question has arisen as to what is the proper license levied against a person engaged in discounting conditional sales contracts in this State under the following facts:

"1. The General Motors Acceptance Company maintains its present office in Birmingham; they also maintain a branch office in Montgomery; the capital employed by them doing such business throughout the State, part of which is handled in the Birmingham office and part of which is handled through the Montgomery office, is over \$500,000. Does the payment in Jefferson County of the maximum license levied by this schedule of \$300.00 to the State and \$150.00 to the County permit them under that license to maintain offices in both cities in this State?

"2. Would a person maintaining two offices, (one in Jefferson County and one in Montgomery County) doing a business of \$200,000 in Jefferson County and \$100,000 in Montgomery County be required to procure a license in Jefferson County based on capital employed of \$200,000, and an additional license in Montgomery County based on capital employed of \$100,000?

"3. Would a person who maintains three or more offices in Alabama, employing a total capital of \$14,000.00 be required to procure a license for each office?"

With reference to the inquiry contained in paragraph one of your letter, I am of the opinion that the same should be answered in the affirmative.

Schedule 93½.1, as the same appears in General Acts of the Legislature of Alabama, Regular Session of 1935, page 476, after making provisions for determining the amount of license tax to be paid by the tax payer dependent upon the amount of capital employed by the tax payer in the conduct of his business, provides as follows:

"the payment of which shall be sufficient to engage in business in any county of the State except County in which principal office is located in which case County License shall be one-half of above schedule."

From the language of the above quoted portion of said schedule 93½.1, in my opinion, any person, firm or corporation engaged in the business for which license tax is therein provided, would have the right to select the county of the location of its principal office; and, when this selection has been made, and State and County license taxes have been paid, in the county of its selection for its principal office, upon the total capital employed in the conduct of all of its business in the State, then, that would be sufficient as a permit to engage in such business in any County of the State; and, even though such person, firm or corporation may maintain a branch office in each of the other Counties of the State in which they may engage in such business, yet, no further State or County license tax would be due.

With reference to the inquiry made in paragraph two of your letter, in my opinion, a person maintaining two offices, one office in each of two Counties of the State, employing capital in the amount of \$200,000 in the business in one of the Counties, and capital in the amount of \$100,000 in the other County, would have only to select the County in which it maintains its principal office, and pay State and County license tax, in the County of its selection, based upon capital employed in the conduct of said business in said two Counties in the aggregate amount of \$300,000.

With reference to the inquiry made in paragraph three of your letter, it is fully answered hereinabove to the effect that license tax is required to be paid only in the County of the State in which the party engaging in such business maintains its principal office, irrespective of the number of Counties in which offices may be maintained.

Attention is called to the law relating to the construction of statutes imposing license taxes to the effect, that they should be strictly construed against the State or taxing power; and, that they must be confined to strict

letter of their language and their application cannot be enlarged by implication or inference; and, that it must show plain intent to include particular license within its terms. **State v. Dr. Pepper Bottling Company**, 155 So. 92, 26 Ala. App. 125, Cert. den. 155 So. 93, 228 Ala. 607.

To the extent that the former opinion of the office appearing in Quarterly Report of the Attorney General, Volume I, page 125 conflicts with the conclusions herein announced, the same is modified hereby.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. D. M. Maxwell, Jr.,
Treasurer of Monroe County,
Monroeville, Alabama.

November 24, 1937.

Monroe County—

1. County Treasurer held not to have legal authority to pay out funds in the county treasury as salary to the purchasing agent of said county.

2. County Treasurer held to have legal authority to pay, from the Gasoline Tax Fund received by said county from the State, salary of clerical help employed in the office of the Superintendent of County Roads and Bridges.

3. County Treasurer held to have legal authority to pay, from Gasoline Tax Fund received by said county from the State, salary of the county road foremen, but not the salary of the Superintendent of County Road and Bridges.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 21, 1937, as follows:

“Will you please give me your legal opinion on the following questions:

1st.—Is it legal for me to pay out of any funds in the County Treasury, salary to the Purchasing Agent of the County?

2nd.—Can I pay from the Gasoline Tax Fund that is received from the State, clerical held that is employed in the office of the Superintendent of County Roads and Bridges?

3rd.—Can I pay from the Gasoline Tax Fund, salaries of the County and County District Road and Bridge Supervisors?”

In answer to your first question, I advise you that you, as County Treasurer, are without legal authority to pay from the funds in the County Treasury the salary of the purchasing agent of Monroe County. This office, in an opinion rendered to Hon. W. E. Merrell, President, Board of Revenue, Shelby County, Columbiana, Alabama, under date of December 7, 1932, held that a Commissioners Court, Board of Revenue or like governing body is without authority to appoint a purchasing agent for the county. A copy of this opinion is enclosed herewith for your information. Therefore, the Commissioners Court, Board of Revenue or like governing body is without authority, under the general law, to appoint a purchasing agent for the county, the general laws of the State not having been changed in this respect since the date of the opinion, *supra*. I have made a careful examination of the Local Acts pertaining to your county and I find no authority contained in said Acts for the appointment by your Board of Revenue, which is the governing body of your county, of a purchasing agent for the county. Since there is no authority of law for the appointment by your county governing body or a purchasing agent for the county, it necessarily follows that you, as County Treasurer, do not have the legal authority to pay out of any funds in the County Treasury the salary of the purchasing agent for the county.

Your second question must be answered in the affirmative, i. e., you, as County Treasurer, do have the legal authority to pay from the Gasoline Tax Fund that is received by the county from the State the salary of clerical help that is employed in the office of the Superintendent of County Roads and Bridges. The Board of Revenue of your county was established by Act No. 548, Local Acts 1915, page 394, approved September 24, 1915. Three later Acts materially changing the law governing the Board of Revenue were passed in the 1923 and 1927 sessions of the Legislature. The 1923 Acts are Act No. 115, Local Acts 1923, page 38, approved August 1, 1923, and Act No. 116, Local Acts 1923, page 42, approved August 1, 1923, and the 1927 Act is Act No. 274, Local Acts 1927, page 191, approved August 11, 1927. The pertinent law which governs the answers to your inquiry is contained in Section 1 of the 1927 Act, *supra*, which amends Section 5 of Act No. 115 of the 1923 Legislature, *supra*. By Section 1 of the 1927 Act, Section 5 of the 1923 Act was amended to read as follows:

"Section 5. The Board of Revenue shall appoint a superintendent of public roads for Monroe County, whose salary shall be fixed by such board but such salary and expense account combined shall not exceed \$300.00 per month, and shall be paid out of the road and bridge fund or the general fund. Any vacancy shall be filled by appointment of such board of revenue. Said superintendent shall have general supervision of the road and bridge work of the county under direction of the board of revenue. He shall have authority to employ such foreman and other workers as he may deem necessary for the proper prosecution of the work of maintenance and construction of roads and bridges, may issue to foremen commissions of authority, and they shall be authorized to work persons subject to road duty on the public roads and bridges of the County. The superintendent shall endeavor to so plan and prosecute the work as to keep it going in each board of revenue district in the County, and shall advise with the Probate Judge and the members of the Board of Revenue from time to time to the end that the policies of the Board of Revenue may be understood and carried out."

It will be noted from a reading of the above quoted provisions that the Superintendent of County Roads and Bridges has the authority to employ

such foreman and other workers as he may deem necessary for the proper prosecution of the work of maintenance and construction of roads and bridges. If the Superintendent of County Roads and Bridges, pursuant to that authority, has deemed it advisable and necessary for the proper prosecution of the work of maintenance and construction of roads and bridges in the county to employ clerical help in his office, then you, as County Treasurer, have the legal authority to pay the salary of such clerical help out of the Gasoline Tax Fund that is received by Monroe County from the State of Alabama, the said tax having been levied by the State and apportioned to the various counties of the State for the construction, maintenance, supervision and repair of roads and bridges in said counties.

In answer to your third inquiry, I advise that you, as County Treasurer, have the legal authority to pay from the Gasoline Tax Fund that is received by your county from the State the salary of the road foremen that are employed by the Superintendent of County Roads and Bridges, pursuant to the authority vested in him by Section 5, supra, this, for the same reasons that support the conclusion reached in answer to your second inquiry. However, you do not have authority to pay the salary of the Superintendent of County Roads and Bridges from the Gasoline Tax Fund that is received by your county from the State of Alabama because of the fact that Section 5, supra, provides that his salary be paid from the Road and Bridge Fund or the General Fund of the County. It seems very clear from the provisions of Section 5, supra, that the legislature intended that the salary of the Superintendent be paid from either the constitutional Road and Bridge Fund or the General Fund and not the Gasoline Fund. The constitutional Road and Bridge Fund of the county and the Gasoline Tax Fund received by the county from the State are separate funds which, along with other funds, make up the General Road Fund of the county, but each of said funds must be expended in accordance with the statutory provisions regulating the expenditure thereof. **Ramag, Parks & Co. v. Folmar**, 214 Ala. 661, and **Ramag, Parks & Co. v. Flomar**, 219 Ala. 142. A county governing body cannot by resolution, or otherwise, direct the expenditure of the Gasoline Tax Fund received by the county from the State for the payment of a claim which the legislature has, by statute, made a claim against another fund or funds. **Weaver v. Tidwell**, 228 Ala. 169.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. L. E. Hall,
Circuit Clerk,
Pike County,
Troy, Alabama.

Costs—Witness fees, which are not paid by the Convict Department, under Section 3667, Code of 1923, are payable out of the fine and forfeiture fund provided there is a valid judgment for costs covering same against the defendant and execution properly issued and returned "no property found." However, execution cannot issue if defendant has worked out said costs in hard labor cases.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of August 10, 1937, which is as follows:

"On October 29th, 1936, you rendered an opinion to Hon. Chas. W. Lee, State Comptroller regarding fees of witnesses summoned to appear in more than one case in the same day; said opinion appears on page 65, Quarterly Report of Attorney General for period October 1st, 1936 through December 31st, 1936, and in this opinion as well as in former opinions therein cited, you hold that a State witness summoned in more than one criminal case in the same day, if held over from one to the other, is entitled to his per diem in as many cases as he is summoned and held over for and proves his attendance but only entitled to mileage in one case.

"I have now some cases where the same witnesses were subpoenaed in more than one case set for trial the same day, and upon the witness presenting his subpoena to me on the same day of the trial, thus proving his attendance I issued him witness Certificate in each case where he attended as a witness for his 75c per diem except in one case and that of the witness election and in that one I issued him a Witness Certificate for his 75c per diem and 5c per mile traveled to and from Court, under Section 3770 of the Code of Alabama of 1923, and under information received through opinions of the Attorney General as cited in the opinion hereinabove mentioned. Now the State Convict Department refuses to pay the fees of a witness in more than one case in the same day and cites as their authority for such refusal that certain part of Section 3667 of the Code of Alabama of 1923 which reads as follows:

"But no witness shall be entitled to fees in more than one case on the same day."

"And the Convict further states to me that 'if a witness proves attendance in more than one case on the same day the charge would be one to be absorbed by your fine and forfeiture fund.'"

"We are operating under the General Law in this County, That is, where witness fees are collected by me as Clerk either from the Defendant or from the State Convict Department I turn such fees over to the County Treasurer to be credited to the fine and forfeiture fund and certify that Witness Certificate covering such fees as a proper claim vs. the fine and forfeiture fund and upon my certificate they are paid from said fund but I only can certify such certificates as I have actually collected and delivered the money to cover, Now if the Convict Department is correct will you advise me how the witness certificate which the Convict Department will not pay can be gotten in proper shape to be paid by the County Treasurer out of the fine and forfeiture fund?"

In answer to your inquiry, I am of the opinion that witness fees, which are not paid by the Convict Department under Section 3667, Code of 1923, are payable out of the fine and forfeiture fund provided there is a valid judgment covering same against the defendant, and execution is properly issued and returned "no property found." However, execution cannot issue if defendant has worked out said costs in hard labor cases.

An opinion of this office found in Quarterly Report of Attorney General, Vol. 5, p. 65, deals with the question as to the payment of witness fees to one who testified in more than one criminal case in one day. Under Section 3667, Code of 1923, the Convict Department can only pay the same witness one time for testifying in one day although he testified in more than one case. Therefore, if a witness be entitled to fees for testifying in more than one case on the same day and the Convict Department will pay only one witness fee, the question then presents itself as to how the other witness fee or fees to which he may be entitled can be paid. In my judgment, such a situation should be treated as any other item of costs which is properly taxable against the defendant and which is not paid by the Convict Department under Section 3667, supra.

Considering the proposition of the payment of costs from the fine and forfeiture fund, in an opinion of this office found in Quarterly Report of Attorney General, Vol. 2, p. 118 the following conclusions were reached in dealing with hard labor cases:

"1. Execution for costs may issue only upon a valid and unpaid judgment therefor.

"2. While the convict may not be compelled to serve more than ten months to pay costs, if after serving the maximum sentence there remains an unpaid balance, execution may issue for said unpaid balance.

"3. Execution may issue upon a valid, unpaid judgment at any time before sentence for costs is served, subject to the limitations of the law governing such issuance of execution.

"4. The labor of the convict is an extinguishment pro tanto of liability for costs. Such credit for costs must be allowed at the rate of seventy-five cents per day.

"5. No execution may issue for costs or any part thereof, previously paid in labor."

Said opinion is dealing with felony cases in this respect states as follows:

"In felony cases, the convict does not work out costs, as he is not sentenced therefor. Such costs are payable however upon proper issue and return of execution 'no property found', from the fine and forfeiture fund."

However, the above rules are limited in two respects: (1) Execution must be properly issuable and cannot issue for costs against a defendant for any items the State fails to pay under Section 3667, supra, after he has been sentenced to hard labor and actually worked out all costs, etc.—**Biennial Report of Attorney General, 1932-1934, p. 436**; (2) Any items of cost that are paid by the Convict Department are not again payable by the defendant, and, therefore, execution cannot issue for same and, therefore, cannot be paid out of the fine and forfeiture fund.—**Quarterly Report of the Attorney General, Vol. 2, p. 118, supra.**

The premises considered, it follows that if a witness is entitled to witness fees for more than one case in the same day and only one is paid by the Convict Department, the remainder may be paid from the fine and forfeiture fund provided execution is properly issued and same is returned "no property found." However, execution cannot issue unless there is a valid judgment against the defendant for costs which includes this unpaid witness fee. And further, execution cannot issue if the defendant has worked out the costs in question in hard labor cases. In penitentiary case the defendant is not sentenced for costs and execution may issue if there is a valid judgment for costs.

If execution is properly issued and costs are collected out of defendant, then the clerk should certify these costs to the Convict Department and the convict given credit for same in hard labor cases. But this rule is different in penitentiary cases as the convict is not sentenced for costs in such cases. Therefore, no credit is allowed if any costs are collected from the defendant.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. Minus H. Johnson,
Clerk Circuit Court,
Walker County,
Jasper, Alabama.

Forfeiture—Bail Bond on charge of non-support.

Money derived from forfeiture of bail bond given to answer charge of non-support, must be paid to fine and forfeiture fund of county in which prosecution is pending.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"A defendant, on complaint of his wife, was tried in the County Court on a charge of non-support and was convicted. Defendant appealed the case to the Circuit Court and appearance bond was filed as per attached copy. On the date set down for hearing in the Circuit Court defendant failed to appear and the Court ordered forfeiture taken against his bondsmen. The forfeiture was made final in the sum of \$100.00 and was paid by the bondsmen.

"Question: Does the forfeiture collected in this case accrue to the fine and forfeiture fund of the county, or does it accrue to the wife of the defendant?"

It is my opinion the money derived from the forfeiture of the bail bond, as mentioned in your letter, given to answer charge of non-support, should be paid to the fine and forfeiture fund of the county in which prosecution was pending. I find no law to except these funds from the operation of Section 4038, Code of Alabama, 1923, which reads as follows:

"Section 4038. FINES TO GO TO COUNTY, AND JUDGMENT ACCORDINGLY.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

Therefore, you will pay said money to the fine and forfeiture fund of your county, if the proceedings were pending there.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Section 46—A violation of Section 46 to refill bottles to which is affixed a state revenue stamp for the purpose of indicating the payment of the tax under said act.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 25th in which you request my opinion as follows:

"The question has arisen on numerous occasions with regard to Section 46 of the Beverage Control Act in reference to the definition of re-used stamps. In order to intelligently answer what constitutes the re-use of a revenue stamp, we would like to have your opinion on the following:

"Would it be a violation of Section 46 for persons to take empty bottles on which there is affixed the State Revenue Stamp and re-fill same with alcoholic beverages made by them or purchased not in accordance with the Alabama Beverage Control Act.

Section 46 of the Alabama Beverage Control Act provides that:

"Whoever * * * re-uses any stamp, crown or lid which has heretofore been used for the purpose of paying any tax provided in this act, or identifying any articles enumerated and defined in this act"

is guilty of a felony. The question raised by your letter is whether the refilling of a bottle to which is affixed the state revenue stamp with alcoholic beverages illegally made or purchased not in accordance with the Alabama Beverage Control Act is such a re-use of the stamp as is prohibited by this section.

I do not consider in this opinion the question of the other provisions of said Beverage Control Act violated by such a procedure set out in your letter.

In my opinion, the use of an empty bottle to which is affixed a state revenue stamp is a re-use of the stamp, crown or lid. If such re-use is for the purpose of paying the tax or for the purpose of identifying the article, the alcoholic beverages, then such re-use is a violation of Section 46 of the act. The mere refilling of the empty bottle to which is affixed a state revenue stamp would not in and of itself constitute a violation of this section, for it is only the re-use of the stamp either for the purpose of paying the tax or of indicating that the beverage was properly purchased from the Board, that is prohibited by this section.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Counties—No authority to borrow money from general fund to purchase road machinery and supplies, which money is to be paid back from gasoline tax fund. However, general fund moneys may be transferred to gasoline fund or road and bridge fund provided there is a surplus in general fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 18, 1937, which is as follows:

"Can a county legally borrow from the general fund to purchase road machinery and supplies, the money so borrowed later to be repaid from the gasoline tax fund?

"Dale County wants to purchase a Deisel Shovel and several trucks for use in road construction. We wish to pay cash and save interest

charges, but have not sufficient cash in the gasoline tax fund at the present time for this purpose. We do have the money in the general fund to take care of these purchases, if we can legally use it this way, later returning the amount so used from future gasoline tax funds."

In answer to your inquiry, I am of the opinion that there is no authority to borrow money from the general fund to be paid later from the gasoline tax fund. However, general fund moneys may be transferred to the gasoline fund or road and bridge fund provided there is a surplus in the general fund.

I am unable to find any authority allowing the borrowing of money from the general fund to supplement the gasoline fund or the road and bridge fund. However, under the provision of Section 1351, Code of 1923, as carried forward as Section 161 of the Highway Act of 1927, (General Acts 1927, p. 392), the commissioners court is authorized to transfer to a road fund money from the general fund only where there is a surplus of such general fund.—**Biennial Report of Attorney General, 1930-1932, p. 446.**

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. H. E. Kendrick,
Tax Collector, Dallas County,
Selma, Alabama.

Taxation—Homestead Exemptions—Act 107, General Acts of 1936-37, page 113. Tax Collector required to honor credit certificate issued by Tax Assessor for homestead exemption. Variance between name in which property assessed and name of exemptioner does not prevent such Tax Collector from honoring certificate of credit properly issued by Tax Assessor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of November 6th in which you request my opinion as follows:

"Assessment and Book of Collections show certain property assessed to A. The certificate of Homestead Exemption made out in the name of, and presented by B, who claims ownership and occupancy of the certain property assessed to A. Shall the tax Collector honor said certificate as credit against assessment of A? In other words, should the Tax Collector honor certificates of Exemption in cases where the name on abstracts (or book) of collections is different from the name on certificate of Exemption, even though ownership and occupancy is claimed by holder of the exemption certificate? Some of these cases are caused by the death

of the husband or wife since assessment was made for 1937 tax year, and Tax Assessor made out exemption certificate in name of living party, in whose name the property will be assessed for 1938 tax year.

"Please give me an opinion on this matter as soon as possible, as such cases come up daily."

By the opinion of this office to Honorable T. L. McKee, reported in Quarterly Reports Volume 8, page 292, it was held:

"Section 31 of an act entitled 'An Act to provide for the general revenue of the State of Alabama,' as amended, General Acts of 1936, page 4, requires that homestead must be separately listed and valued. This act was approved on March 12, 1936.

"The Legislature, by Act No. 107, approved Feb. 20, 1937, said Act appearing in the General Acts 1936-37, page 113, granted an exemption to homesteads from state taxes. The exemption granted under this act applies to taxes due October 1, 1937, and which were assessed October 1, 1936. In re: OPINION OF THE JUSTICES. 175 So. 690.

"The failure of the tax assessors separately to list and value the homestead and to credit the taxpayer with an amount equal to the state taxes on such homestead necessitated, after the rendition of the foregoing opinion, issuance of a proper credit on the amount of the taxes certified by the tax assessor to the tax collector as being due by the taxpayer. A certification without such credit was an error on the part of the tax assessor which he is authorized to correct.

"It is the duty of the tax collector to give the taxpayer the benefit of the exemption which the Legislature granted and to correct the amount of the certification by crediting the taxes of such taxpayer in an amount equal to that certified by the tax assessor as shown on the original certificate of credit or on a duplicate thereof but within lawful limits."

The circumstances set out in that opinion with reference to the exemptions being granted after assessments were already completed, quite often results in a variance between the name of the party making the assessment in October, 1936, and the party who will pay the taxes in October, 1937. As you set out in your letter, some of these cases are caused by the death of the party making the assessment. In other cases there are joint assessments in the name of all of the joint tenants, while under the opinions of this office only such of the joint owners as are in actual occupancy are entitled to a homestead exemption. (See Quarterly Reports Volume 8, pages 19, 66, 267).

Under these and other circumstances the Tax Assessor is under a duty to grant a certificate of credit to the party entitled to such homestead, even though the assessment may have originally been made in another name. You as Tax Collector are under a duty to give the taxpayer the benefit of such exemption as evidenced by the certificate of credit made by the Tax Assessor. I realize there may be some administrative difficulties connected with those cases where the certificate of credit bears a different name from the original assessment, but in such cases the Tax Assessor could furnish you with the name of the original assessment for the taxes on which the certificate of credit should be applied. If the Tax Assessor has made an error in granting the certificate of credit he is responsible therefor and not the Tax Collector.

A similar situation is presented as in the case where the Tax Assessor made an erroneous assessment. You are obliged to collect taxes on the assessment as shown on the abstract furnished to you, as amended by the certificates of credit issued by the Assessor. For any error of the Tax Assessor, either in preparing the assessment rolls or in granting such certificates of credit, you are not liable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. L. W. Jordan,
Superintendent of Education,
Jackson County,
Scottsboro, Alabama.

School Code Amended—General Acts 1935, page 1092—Section 4 amending Section 182 of School Code prohibits school authorities from collecting incidental fees in high schools as well as grade schools.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of inquiry as follows:

"I beg to call your attention to Section 182, found on page 72 of the School Code of Alabama, 1927, which section refers to incidental fees. I also beg to call your attention to Section 4, found on page 1092 of the General Acts of the Regular Session, 1935. Please also refer to an opinion of your office, found on page 85 of the Quarterly Report of the Attorney General for the period of January 1, 1937 through March 31, 1937. Especially do I call your attention to the third paragraph of that opinion appearing on page 87, wherein, as it seems to me, your office has stated that the 1935 act repeals Section 182 of the 1927 act in such a way as to prohibit the school authorities from collecting incidental fees in high schools.

Stated a little differently, the question is this: Section 4, found on page 1092 of the 1935 act unmistakably repeals Section 182 of the 1927 act insofar as the first six grades are concerned, but does this Section 4 also have the effect of repealing Section 182 in the matter of the authority to collect fees from students attending high school? In my opinion, Section 4 does not have this effect. From a reading of the amendment of the 1935 act in connection with Section 182 of the 1927 School Code, it appears clearly to me that the attempt of the legislature is to leave undisturbed the authority of the school people to collect incidental fees from high school students. The opinion referred to hereinabove is not quite clear on this score. I will thank you to clarify your

opinion and to let me know definitely whether, in your judgment, Section 4 of the 1935 act has the effect of denying to school authorities the right to collect incidental fees from high schools."

In the opinion referred to by your in your inquiry (Vol. VI, Quarterly Report of the Attorney General, pages 85, 87) it was held that the effect of an act of the legislature, General Acts 1935, page 1092, Section 4, was to repeal Section 182, by specific reference. At the time of writing said opinion it was not necessary to elaborate on this conclusion inasmuch as the statement contained in said opinion was limited to grade schools.

Section 4 of the 1935 Act reads as follows:

"Section 4. That section 182 of the Alabama School Code of 1927 be so amended as to read as follows: 182. INCIDENTAL FEES IN RURAL ELEMENTARY SCHOOLS.—No fees of any kind shall be collected from children attending any of the first six grades during the school term supported by public taxation."

In *Allgood v. Sloss-Sheffield Steel & Iron Co.*, 198 Ala. 500, 71 So. 724, it was held that "where a statute is amended 'so as to read as follows,' the amendatory act becomes a substitute for the original which then ceases to have the force of an independent enactment, and as much of the act as is omitted is repealed."

Section 182, as previously existing in the law, provided that "The Board of School Trustees shall have the power, with the approval of the Board of Education, to fix and collect reasonable incidental fees, to be paid by such pupil entering the school." Under the rule of construction set forth in the *Allgood* case, supra, the amendment of Section 182 clearly withdraws from the Board of School Trustees any authority to fix or collect incidental fees.

The conclusions hereinabove announced do not in any way prohibit the County Board of Education from levying the matriculation fee provided for in accredited high schools by Section 467 of the School Code of 1927, as follows:

"467. MATRICULATION FEE MAY BE CHARGED.—A matriculation fee may be collected for each semester from all pupils in accredited high schools, including County High Schools, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be, and the proceeds of such fees shall be expended under the direction of the County Board of Education or the City Board of Education as the case may be. A reasonable fee for library, laboratory and shop work may be required, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. W. M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

License—When license inspector has cited person, describing motor number and car, to buy license, and said person sells the car to another person without purchasing license and the second owner applies for a license, he should be required to pay the penalty provided by Sub-section (c) of Section 353 of the 1935 Revenue Act and citation fee provided by Sub-section (g) of Section 353 of the 1935 Revenue Act, by virtue of the citation issued the first owner thereof.

(a) Sub-section (2) of opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of October 24, 1936, Quarterly Report of Attorney General, Vol. V, page 52, is hereby withdrawn, overruled, and held for naught and this opinion is substituted in its stead.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 15, 1937, which is as follows:

"Please advise as to whether your opinion to Hon. Eugene B. Henry, dated October 24th, 1936 was intended to in any way over rule your opinion to the same party July 30th, 1936, in so far as this opinion relates to the collection of penalties from the transferee of an automobile, the former owner having been penalized."

The part of the opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, dated October 24, 1936, found in Quarterly Report of Attorney General, Vol. V, page 52, which deals with the same or a similar question that was dealt with by an opinion to him under date of July 30, 1936, Quarterly Report of Attorney General, Vol. IV, page 100, is the second part thereof. The second question dealt with in that opinion reads as follows:

"2. If A owns an automobile and drives it to a Dealer on October 2nd and sells same to a dealer and he in turn resells this same car to another owner on November 15th and the last mentioned owner applies for a license on November 15th is he liable for the penalty for the car being operated on October 2nd or could he make affidavit that the car had not been operated on the highways while in his possession without proper license and avoid paying the penalty."

The part of the syllabus of the opinion dealing with that question stated:

"2. Under facts party held not liable for penalty for delinquency."

The body of the opinion dealing with this question follows:

"In answer to question 2, I advise that in my opinion the penalty for delinquency would not attach to the **last owner** under the facts set out by you, if he has not actually operated the same himself."

In answer to your question, I advise you that this part of the October 24 opinion to Mr. Henry was not intended to in any way overrule or modify the opinion to him in July. To dispel any possible confusion that might exist in regard to the opinion of this office on this subject, the second part of the October opinion to Mr. Henry is hereby expressly overruled, withdrawn, and held for naught, and the following is substituted in its stead:

The answer to the second question is covered by an opinion of this office under date of July 30, 1936, addressed to you, which is found in Quarterly Report of Attorney General, Vol. IV, on page 100, and holds as follows:

"Licenses—When License Inspector has cited person, describing motor number and car, to buy license, and said person sells the car to another person without purchasing license and the second owner applies for a license, he should be required to pay the penalty provided by Sub-section (c) of Section 353 of the 1935 Revenue Act and citation fee provided by Sub-section (g) of Section 353 of the 1935 Revenue Act by virtue of the citation issued to the first owner thereof."

Therefore, under the facts set out in your inquiry, the person making application for automobile license on November 15 would be liable for the penalty for delinquency in the purchase of said license by virtue of the fact that the said automobile had been driven on the highways of the State subsequent to the beginning of the license year on October 1, notwithstanding the fact that it was so driven thereon by a prior owner and not by the present owner, who is making application for the license. However, in this situation the present owner would not be subject to the citation fee unless a citation had been issued to the prior owner, a copy of which had been filed with the probate judge, on which was shown the motor number of the vehicle.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 29, 1937

Hon. Howell Turner,
Secretary of State,
Capitol.

1. Elections—Notices required to be given by boards of Registrars of time and place of meeting either by posting bills or by newspaper publications, held payable by the State, upon approval of the Secretary of State.

2. No per diem provided for said services of posting notices of time and place of meeting of Boards of Registrars.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Inquiries from members of the Boards of Registrars have reached me inquiring whether or not the State is liable for expense accounts for posting notices of the time and places of registration of voters. Also whether a per diem could be paid by the State therefor.

"Therefore, please advise me whether or not such claims constitute a lawful charge against the State, and whether or not it is my duty as Secretary of State to approve same."

In reply, I wish to advise you that in my opinion the publication of notices as provided for by Section 386 of the Code of Alabama, 1923, contemplates two methods of publication, namely: by posting notices at three or more public places in each election precinct and by advertisement once a week for three successive weeks in a newspaper if there be one published in the county. I refer you to Section 375 of the Code of Alabama, 1923, which provides in part as follows:

"They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisements once a week for three successive weeks in a newspaper, if there be one published in the county
* * *"

Section 386 of the Code of 1923, provides in part as follows:

"The cost of the publication of the notices required to be given by the registrars shall be paid by the state, the bills therefor to be rendered to the secretary of the state and approved by him."

In my judgment the legislature has defined the method of publication and has provided for the payment of expense accounts in connection with the posting of notices of the time and place of registration of voters which is one method of publication provided for by the legislature.

It is my opinion that the costs or itemized expense accounts for posting such notices should be paid by the State of Alabama upon approval by the Secretary of State to whom such itemized expense accounts must be submitted for approval. I find no provision for a per diem to be paid by the state therefor. The reasonableness of the charges made is a matter that addresses itself to the Secretary of State and in my judgment it is the duty of the Secretary of State to examine the expense accounts and approve the same.

I wish further to refer you to an opinion of this office addressed to Hon. W. H. Price, Chairman, Board of Registrars, Madison County, Huntsville, Alabama, under date of November 18, 1935. (Quarterly Report of Opinions of the Attorney General, Volume I, page 91).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 30, 1937

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Bessemer, Alabama.

Taxation—Ad valorem exemptions on hospital.

1. Property used exclusively for hospital purposes and said purposes being purely charitable entitled to exemption from tax.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of recent date which is as follows:

"The Norwood Hospital was owned by Dr. Carraway, of this city. He gave this hospital to the First Methodist Church of Birmingham with the understanding that it, and its income, would be used exclusively for charitable purposes only.

"The question I would like answered is:

"Is it entirely exempt or only the usual \$20,000.00?"

I also have your letter of November 20, 1935, written in response to my request for additional information, as follows:

"Replying to your of the 7th with reference to the Norwood Hospital and in answer to question No. 1 will say that the hospital is used exclusively for hospital purposes and for no profit or gain to the First Methodist Church.

"No. 2. Both indigent and pay patients are received.

"No. 3. The hospital is used primarily for charitable purposes and is not operated for the purpose of making a profit for the proprietor.

"This information was given me by the Secretary of the First Methodist Church and the attorney who handled the papers when the hospital was given to the church by Dr. Carraway."

Upon the above statements of fact, it is my opinion that the property is exempt from ad valorem tax under the Constitution, Section 91 in Article 1. Section 3(a) of the Revenue Act of 1935. Said sections read as follows:

"Section 91. The legislature shall not tax the property, real or personal, of the state, counties or other municipal corporations, or cemeteries; nor lots in incorporated cities and towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the

buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable."

Article 1, Section 2(a), exempts the following property:

"All property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institutions, society or corporation, let for rent, or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes."

If any part of said statutory provision is in conflict with said Section 91 of the Constitution, the statute must yield to that extent to the Constitution. Since said statutory provision is the same as that existing in the Revenue Act of 1919, I refer you to the opinions of the Attorney General, to the Hon. John S. Mooring, Chairman, State Tax Commission, dated January 9, 1920, and July 23, 1920, respectively, Biennial Report 1918-1920. The general principles governing exemptions of property used for charitable purposes are fully set out therein. In addition to the authorities cited, I cite *State v. Alabama Educational Foundation*, 163 So. 527, 231 Ala. 11.

Briefly, the opinions, *supra*, held:

(a) "Exclusive use" does not preclude charging small fees so long as the entire property was primarily and inherently devoted to charitable purpose.

(b) Property owned by charitable organization but used for commercial purposes not exempt, the test being the use and not the ownership.

(c) Exemption of property of charitable institution is either entirely exempt or subject to taxation.

(d) Hospitals are exempt from taxation when any income received is devoted entirely for furthering the charitable object of the institution.

The above is also based upon the assumption that the property also complies with Constitution, Section 91, as to location and area.

In Act number 172, General Acts, 1923, page 153, the provision now being Section 2 (b)-(1) of Article 1, Revenue Act of 1935, made its first appearance. It reads as follows:

"All property, real or personal, used exclusively for hospital purposes, to the amount of twenty thousand dollars, where such hospitals maintain wards for charity patients, or gives treatment to such patients, provided that the treatment of charity patients constitute at least 15% of the business of such hospital; provided further that such hospital need not be assessed for taxation if the owner or manager shall file with the County Tax Assessor wherein such hospital is located within the

time allowed for assessing such property for taxation a certificate that such hospital has done 15% charity work in the preceding tax year; and further provided that such hospital through its owner or manager shall have until the expiration of the preceding tax year to class its work and ascertain whether or not such hospital has done 15% of its total treatment of patients as charity work."

This provision applies to all property used exclusively for hospital purposes, to the amount of twenty thousand dollars, regardless of the charitable or commercial purpose of the proprietor or institution, provided "the treatment of charity patients constitutes at least 15% of the business of such hospital irrespective of the fact that separate rooms, departments or wards were or were not maintained." *Gay et al vs. State et al*, 153 So. 767, 228 Ala. 253. It was the evident intent of the legislature to exempt all property used exclusively for hospitals under the proviso fixed, irrespective of the primary purpose being charitable or for gain or profit, as an exemption in addition to that provided in the Constitution to charitable uses.

The test is based upon the determination of the question of fact in each individual case as to the use of the property, during the tax year for which the property is assessed. The question of exemption vel non and the extent of the exemption is determined by the use of the property and not by the ownership or the application of the income from the property. *Aniston City Land Company v. State*, 48 So. 659, 160 Ala. 253; *State et al v. Church of Advent*, 95 So. 3, 208 Ala. 632; *Gay et al v. State*, supra; *State v. Alabama Educational Foundation*, supra.

It is my opinion, upon the above facts, supra, that the Norwood Hospital comes within the facts necessary to exempt it from ad valorem tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 1, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Taxation—Exemption of Alabama State Fair Association—Section 2, subsection (k), Acts of 1935, p. 258.

Tax exemption accorded Alabama State Fair Association not lost by reason of occasional use of property contrary to primary use upon which the exemption is based.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"The Alabama State Fair Association of Birmingham owns fifty or sixty acres of land with buildings including a grand stand, race track, etc., however, the Association rents the ground for Ringling Brothers Circus and automobile races at other times during the year.

"Please advise me if the above mentioned Association is exempt from Ad valorem assessment under Section 3028 of the 1923 Code and Subsection K of Section 2 of the Revenue Code of 1923."

It is my opinion that tax exemption accorded Alabama State Fair Association pursuant to Section 2, subsection (k), Acts of 1935, p. 258, and Section 3028, Code of Alabama, 1923, is not lost by reason of an occasional use of the property contrary to the primary use upon which the exemption is based.

I refer you to Corpus Juris, Vol. 61, pp. 401-402, paragraph 405, from which the following excerpt is taken:

"Also, it is the primary, as distinguished from an incidental, use of the property that determines the question whether it is exempt from taxation, and, as bearing on the question whether property is being used in a way to entitle its owner to an exemption, his application of the proceeds from its use and occupancy, as well as the fact of use and occupancy, must be considered, although it is not conclusive, the property owner's motive for his use of property being, however, immaterial."

Reference is made to Note 85, p. 402, supra, as follows:

"Town of West Hartford v. Connecticut Fair Ass'n., 92 A. 432, 88 Conn. 627; In re Assessment of Taxes of Waiahole Water Co., Ltd., 21 Hawaii 679; Peo. v. Omega Chapter of Psi Upsilon Fraternity, 167 N. E. 16, 335 Ill. 317; School of Domestic Arts and Science v. Carr, 153 N. E. 669, 322 Ill. 562; Peo. v. Catholic Bishop of Chicago, 142 N. E. 520, 311 Ill.; Peo. v. Muldoon, 137 N. E. 863, 864, 306 Ill. 234, 28 A. L. R. 857.

"The primary use of a schoolhouse is for education, and an occasional use for a lecture or social affair will not destroy the exemption. Primary use of a church building is public worship, and its occasional use for some other purpose or a minor use for social functions will not render it liable to taxation. On the other hand, if the primary use is secular, the fact that a portion is incidentally used for religious purposes will not make it exempt from taxation." Peo. v. Muldoon, supra."

The foregoing authorities support my conclusion that an occasional use of the property as outlined in your letter does not destroy the exemption accorded said Alabama State Fair Association by the laws of Alabama.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 1, 1937

Hon. Gaston Scott, President,
State Highway Commission,
Montgomery, Alabama.

Highways—Tractor and Semi-Trailer on—Pneumatic tires used for hauling cotton and other farm products on highways of State lawful, but subject to license.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I have your letter of September 10, 1937, as follows:

"The State Highway Patrol has found an outfit operating on the highways of the State in Montgomery County which consists of a tractor known as a 'Farmerall' and semi-trailer. This outfit is being used to haul cotton and other farm products. This Farmerall is mounted on pneumatic tires and is designed for use in the fields in plowing or doing anything that required tractive power. The question has arisen as to whether this type of tractor drawing a semi-trailer is legal on the highways of this State.

"If you rule this tractor and semi-trailer are legal on the highways, under what license classification would it be placed?

"I would thank you to advise me as to the legality of this outfit at your earliest convenience as the owner of same operates a large farm and uses machinery entirely and this outfit is the only transportation he owns and he has a large amount of cotton to be hauled to gin."

I am of the opinion that the "Farmerall" is legal on the highways of this State, subject to the restrictions as to size and weight contained in Section 80 of the Highway Act (General Acts 1927—348, at page 378). The "Farmerall" complying with these restrictions, I find nothing which would prevent it being used on the highways of this State.

As to the question of license it is my opinion that when such a vehicle is used for **general hauling** as described in your letter then it is liable for a license. Schedule 158.10 of the License Schedule, Revenue Code of 1935 at p. 333 (Act No. 194—General Session 1935) reads as follows:

"SCHEDULE 158.10. For each MOTOR TRACTOR used on the highways of this State there shall be paid a license or privilege tax of one hundred dollars. Provided, however, that this license shall not be collected for a tractor when run on a highway to be transferred from one point to another for use on a farm, or when used on the highway for transferring what is commonly known as a 'portable saw mill' or a 'well-boring outfit.' "

Schedule 158.11 of said license schedule provides for an additional license for trailers and semi-trailers. However, under said schedule where the

trailer is used by persons exclusively for the hauling of farm products raised by said farmers, then no additional license is required.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 3, 1937.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Schedule 146, Revenue Laws of Alabama, as amended by Act 230, Special Session, 1936-37—Transient vendor using motor vehicle for purpose of transporting merchandise but not as a rolling store, liable for license tax under sub-section (b) of said schedule.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of October 7, 1937, in which you request my opinion as follows:

"Under Schedule 146 of the Revenue Laws of Alabama as amended March 2, 1937, there is levied a license of \$30.00 for each itinerant vendor or peddler of merchandise using a motor vehicle for the purpose of transporting merchandise from place, etc. Those is also levied under sub-section (c) of same Schedule a license of \$150.00 for each transient vendor or peddler using a vehicle for transporting merchandise, etc.

"We have a number of parties in this county who have bought trucks and built bodies for the purpose of transporting merchandise from place to place, who carry a general line of dry goods and groceries, who sell to the public from these trucks, but who do not allow the public to enter their trucks. We have been called upon by these parties to advise them which section of the above mentioned schedule applies to them.

"Please advise us what license we should sell to these parties operating trucks going from house to house, carrying a general line of dry goods and groceries and selling to the public from such trucks."

Schedule 146, as amended by Act No. 230 of Special Session of 1936-37, approved March 2, 1937, (Acts 1936-37, p. 277) provides as follows:

"Each person traveling on an animal or using a vehicle other than a motor vehicle, doing business as a Transient Vendor or Peddler as defined in this Schedule, displaying, selling or offering to sell any goods,

wares or merchandise, other than to a merchant for resale, shall pay a privilege license to the State of Alabama of Fifteen Dollars (\$15.00) and Five Dollars (\$5.00) for the county in each county in which transient vendor or peddler does business for each vehicle. (b) Each itinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies, who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, shall pay an annual license of Twenty Dollars (\$20.00) to the State and Ten Dollars (\$10.00) to the county in each county in which they do business. This sub-section shall not apply to sales by a licensed merchant in the county in which his store is located. (c) Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this Schedule displaying, selling or offering to sell any goods, wares or merchandise of whatever nature, at retail shall pay to the State in order to engage in such business the following licenses: Upon one (1) motor vehicle, the annual license for each such motor vehicle, not in excess of one, so used, of\$100.00. Upon two motor vehicles, or more, but not to exceed three, the annual license fee for each such additional motor vehicle shall be\$130.00. Upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be\$150.00. Upon each motor vehicle in excess of six, for each such additional motor vehicle \$200.00. In addition to the above, there is levied a license of\$50.00 for the State and a county license of \$50.00 in each additional county in which said business is conducted. Rolling stores which are controlled or held with others by stock ownership of 25% or ultimately controlled or directed by one management or association of ultimate management, shall be deemed for the purpose of this Schedule as being owned by the same person. (d) Each person going from person to person, place to place, or town to town, selling or giving away medicine, salves, ointments, lotions or other goods, wares or merchandise, by exhibitions, shows, performances or other entertainment, whether sold for himself or another, in each county where such sales or gifts are made, shall pay a license of one hundred dollars (\$100.00). Definition of Transient Vendor or Peddler: When used in this Schedule, the words 'Transient Vendor or Peddler' shall be held to include any person embraced in any of the following classifications: (a) All persons commonly and generally termed 'peddlers' and falling within the usual and commonly understood definition of 'peddler', or (b) all persons acting for themselves or as an agent, employee or salesman, or in any capacity for another whether as owner, bailee, or other custodian of goods, wares and merchandise, going from person to person, house to house, or place to place, and selling or offering to sell, or consigning or offering to consign, other than to a retail merchant for re-sale, goods, wares and merchandise; or, (c) all persons who do not keep a regular place of business, open at all times in regular business hours at the same place, going from person to person, house to house, or place to place, or from town to town, and selling or offering for sale, other than to a retail merchant, goods, wares, and merchandise which they carry with them and who deliver the same at the time of or immediately after the sale; or, (d) all persons who go from person to person, house to house, place to place, soliciting orders, other than from a retail merchant for resale, by exhibiting samples, or taking orders and thereafter making delivery of the goods or filling the order, without carrying or sending the order to the permanent place of business. This Schedule shall not

apply to a person or to any number of his immediate household, selling or offering to sell dairy, poultry, or farm products raised, produced or grown by himself, or the immediate members of his household, or such products preserved, bottled, or canned by himself, or the immediate members of his household, or to persons peddling wood, charcoal, fruit or vegetables; or to blind persons or persons physically disabled to the extent of thirty per cent (30%), such disability to be certified to by a reputable physician and the local license inspector, operating other than a rolling store, or to peddlers of poultry and eggs, or to persons selling fish, shrimp, crabs or to other sea foods. These and none other shall be exempt from the payment of the license tax levied by this Schedule. The payment of the privilege license required by this Schedule shall not authorize any transient vendor or peddler to sell any goods, wares or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied, or to sell any goods, wares or merchandise that are by law required to be sold at a fixed location, except upon the payment of the maximum license levied under the Schedule or Schedules of this Chapter for the sale of merchandise at a fixed location."

The question raised by the facts set out in your inquiry is whether such itinerant vendor or peddler is liable for license under Section (b) or under Section (c). Section (b) levies a license or privilege tax upon each itinerant vendor "who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place, but who do not use such vehicle for the display of merchandise or as a rolling store, and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise." Section (c) levies a much higher license upon persons using a motor vehicle and doing a business as a transient vendor or peddler, as defined in the schedule. The distinction between the persons liable for license under Sub-section (b) and under Sub-section (c) is whether such persons use said trucks solely for the purpose of transporting or whether such vehicles are used for the purpose of displaying and permitting purchasers to enter thereon. Under the facts set out in your letter, the vehicles are to be used solely for the purpose of transporting goods. If such vehicles are so used and are not used for the display of merchandise or as a rolling store, and such vendor does not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, it is my opinion that such vendor would be liable for license under sub-section (b) of said schedule. On the other hand, if such vehicle is used to display such merchandise or as a rolling store, or if such vendor permits purchasers to enter said vehicle for the purpose of purchasing merchandise, he would be liable for a license under sub-section (c) of said schedule.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 20, 1937.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

of annual license levied by Schedule 106 as amended shall remain as a special fund is subject to the right of Judge of Probate to receive commission for collecting such license and the amount of such separate fund must bear its proportionate part of the commission of the Probate Judge.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of November 3rd in which you request my opinion as follows:

"Section 1 of the amendment to Schedule 106 of Section 348 of the Revenue Act of 1935 approved March 1st, 1937, provides among other things the following:

"Provided further that after the fiscal year ending September 30th, 1937, two-fifths of the annual license herein levied shall remain in the State Treasury and shall constitute a separate fund to be disbursed by the State Treasurer as follows: All of such funds arising from licenses paid in each of the separate counties of the state shall be set aside in a separate fund for such county and shall be disbursed by the State Treasurer on the order of the Board of Censors of the Medical Society of such county if there be such an organization in such county."

"It is provided that the Probate Judges receive 2½% commission on all license collected and the balance remitted to the State. If a license under this amendment is \$10.00, the Probate Judge receives twenty-five cents commission and remits to the State only \$9.75.

"Then shall the Comptroller set aside two-fifths of \$9.75 or two-fifths of \$10.00 to be disbursed by order of the County Medical Society?"

Your matter involves the proper construction of the word "two-fifths of the annual license herein levied." By such schedule 106, as amended by the act approved March 1, 1937, (Acts of 1936-37, page 210) there is levied a license varying from \$5.00 to \$25.00, depending upon the size of the city or town where the particular business is conducted. However, all licenses levied by the Revenue Act are subject to the provisions of Section 365 thereof, which provides as follows:

"Section 365. Within ten days after the end of each month, the Judge of Probate must remit to the State Treasurer at the expense of the State, all money received by him for license belonging to the State, and pay to the County Treasurer all the money received by him for licenses belonging to the county, and within the same time the Judge of Probate shall forward to the State Comptroller and to the State Tax Commission each certified list of all licenses issued by him, stating thereon for what business issued, amount collected for each license, from whom collected, and the date of such collection; and if no licenses have been issued, he shall report that fact. The Judge of Probate shall be entitled to receive two and one-half per cent of the amount of money collected for licenses due the State, which he may deduct from his remittance to the State Treasurer."

The effect of this section 365 is to entitle the Judge of Probate to $2\frac{1}{2}\%$ of the entire amount of money collected for licenses due to the state. Therefore, although the license levied under this schedule may amount to \$10.00 originally paid, by section 365 the net amount received by the state is reduced by the commission of the Judge of Probate of $2\frac{1}{2}\%$ on the entire amount of the money collected. In my opinion, the words "annual license herein levied" should be construed as subject to the provisions of Section 365 and the separate fund required to be established is reduced by its share of the commission of the Judge of Probate of $2\frac{1}{2}\%$. It is, therefore, my opinion that the Comptroller should set aside two-fifths of \$9.75, the net amount of the license or the amount of the license less the cost of commission thereof, and not two-fifths of \$10.00 or the gross amount of the license.

In my opinion reported in Quarterly Reports I, page 272, this office considered a similar section regulating licenses for attorneys. That section, however, expressly required that "Ten dollars of the license herein levied * * * shall constitute a separate fund." It was ruled that the express requirement was not changed by the provisions of Section 365. In another opinion reported in Quarterly Reports I, page 266, we construed a similar section as to dentists. In that act, the requirement was that 25% of all moneys paid into the State Treasury by dentists for license should be paid over to the Alabama Dental Associations. I reached the same conclusion there as reached here—that the percentage paid to the association is the percentage of the net rather than the gross license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 20, 1937.

Hon. Roy L. Smith,
Attorney for County Commission,
Russell County,
Phenix City, Alabama.

Counties — Expense of condemnation and attorney's fees for bringing condemnation proceedings and acquiring rights of way for public roads may be paid out of gasoline tax.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of December 8, 1937, which is as follows:

"On January 29, 1936, you advised Hon. J. Percy Oliver, Judge of Probate of Tallapoosa County, that payment for rights-of-way for public roads in said County could be made out of the funds derived from Gasoline Tax collected by the State and paid over to the County. (See Volume II page 82, Attorney General's opinion, period from January 1, through March 31, 1936).

"Please advise whether or not Russell County can pay the expense of condemnation and Attorney's fee for bringing condemnation proceedings and acquiring rights-of-way for public roads out of the gas tax.

"Of course when rights-of-way cannot be obtained in any other manner except condemnation proceeding it seems this is a necessary part of the cost of obtaining rights-of-way and the County Commission of Russell County would like to be advised about this matter at your very earliest convenience."

In answer to your inquiry, I am of the opinion that the expenses of condemnation and attorney's fee for bringing condemnation proceedings and acquiring rights of way for public roads may be paid out of the gasoline tax.

In an opinion of this office rendered to the Judge of Probate of Tallapoosa County on January 29, 1936, (Quarterly Report of Attorney General, Vol. II, p. 82), it was held that rights of way for public roads may be paid from the gasoline fund of the county. When condemnation proceedings are necessary the expenses of such condemnation, including reasonable attorney's fees, are such necessary incidental expenses of securing the rights of way as would be considered a part of the cost thereof. Therefore, such expenses may be paid out of the gasoline tax fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 29, 1937.

Hon. Harry Simon, Chief Clerk,
State Tax Commission,
Capitol.

License Tax — Schedule 137, Alabama Revenue Laws, approved July 10, 1935. The state taxing authorities cannot impose license levied by Schedule 137 on General Agents, Traveling Freight Agents or Brokers, soliciting business exclusively for railroads situated without this state. Soliciting freight agents or brokers are not liable for their license levied under Section 137 for soliciting the transportation of freight or passengers, either or both, from points within the State of Alabama to points in other states provided that such solicitation is confined exclusively to businesses engaged in interstate commerce.

Rule applies to both agents or brokers compensated by salary or commission.

Opinion by Assistant Attorney General Park.

Dear Sir:

I have your request for opinion as follows:

"Under the following statement of facts your opinion is requested as to whether or not the general agent or the traveling freight agent

(of a railroad which does not operate its lines in Alabama) who solicits freight and passenger traffic in the state over the roads which they represent is liable for the payment of the license levied by Schedule 137, to wit:

"Any person engaged in the management of business matters, occurring between the owners of vessels, railroads, airplanes, motor vehicles and express companies and the shippers or consignors of the freight and the passengers which they carry, shall be deemed a "SOLICITING BROKER" for the purpose of this schedule. Every person shall pay for this privilege of transacting such business, Fifty Dollars (\$50.00)."

"Such agents do not collect payments for transportation of freight nor do they receive or deliver shipments nor do they have authority to sell tickets; said agents connections direct or indirect has no connection with domestic commerce between two or more places within this state and such business transactions are presumed to relate solely to interstate commerce. Such agents employment is limited exclusively to inducing persons in this state to travel or ship over the lines which they represent through other states.

"Also give us your opinion as to whether or not a soliciting agent who solicits the transportation of freight and passengers, either or both, from points within Alabama to points in other states, would be liable for license under said Schedule.

"Under this last question such agent may operate in one or two of the following manners:

"First. As an employee on a salary basis from such transportation company.

"Second: As an agent whose compensation is on a brokerage or commission basis.

"136 U. S. 104, 34 L. Ed. 391 (1890)

264 U. S. 150, 68 L. Ed. 611

185 U. S. 27, 46 L. Ed. 785

153 U. S. 287, 38 L. Ed. 719.

273 U. S. 34, 71 L. Ed. 524."

It is my opinion that Schedule 137 of Alabama Revenue Laws, approved July 10, 1935, has no application to one engaged exclusively in soliciting business for non-resident transportation companies whose lines do not extend into this state, neither does this Schedule apply to those who are engaged exclusively in soliciting business to be transported from points within Alabama to points in other states, in other words, "business involving interstate commerce." To apply this Schedule in such transactions would be an invasion of the commerce clause of the Constitution, and the United States Supreme Court, in a long line of cases has repeatedly nullified efforts on the part of states and municipalities to levy license taxes on soliciting agents representing non-resident principals for the privilege of soliciting business to be shipped to persons within the state. See *Brown vs. Maryland*, 12 Western 419; *Weldon vs. Mo.*, 91 U. S. 275; *Robbins vs. Shelby Tax District*, 120 U. S.

489; Stockard vs. Morgan, 185 U. S. 27; Stratford vs. City Council of Mobile, 619 20 So. 127.

It has also been held in the case of McCall vs. California, 136 U. S. 104 that a license tax cannot be collected from those engaged in soliciting business to be transported to points outside of the state. In this particular case the State of California attempted to impose a license tax on soliciting passenger agents who confined their activities exclusively to attracting prospective travelers to points without the state to travel over their respective lines.

Nor does it matter whether the party sought to be taxed is an employee on a salary basis, or a broker on a commission basis representing several different concerns engaged in interstate commerce. A very strong case on this point is the Texas Transport and Terminal Corporation vs. the City of New Orleans, 264 U. S. 150, 68 L. Ed. 611, in which the United States Supreme Court held that a corporation employed as Agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business is confined to, and is a necessary adjunct of their commerce, could not be compelled to pay a license tax for the privilege of conducting such business. See also Di Danta vs. Penn., 273 U. S. 34.

However, if such agents or brokers are engaged in general solicitation of both intra-state and interstate business in such manner as to make it impossible to separate and distinguish between the two, Schedule 137, in such cases, would be applicable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 29, 1937.

Hon. A. D. Martin,
Tax Assessor,
Chilton County,
Clanton, Alabama.

Taxation — Overlapping exemptions to insane persons — Section 2(f)—General Acts of 1935 (H. B. 324, General Acts 1935, page 256) page 258, and Act 107, Acts 1936-37, page 113.

Method of computing homestead and other real property exemptions to an insane person.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

Reference is made to your letter which is quoted as follows:

"I would like to submit for your opinion the following question:

"Under sub-division F of Section 2 of the Revenue Code of 1935, the property of an insane person is exempt from Ad Valorem taxation to the extent of \$2,000.00, which, as I understand, has been construed to mean by your office actual value of \$2,000.00 or \$1200.00 assessed value. In an opinion of the Attorney General to John J. Flowers and dated July 6, 1937, your office held that the homestead exemption is in addition to exemption to deaf mutes, insane and blind persons, as provided by the Section just quoted.

"An insane property owner listed for taxation 167 acres and has claimed homestead exemptions on 119 acres the assessed value being \$1104.00 on this 119 acres. This leaves 48 acres valued at \$396.00 assessed valuation. This taxpayer, of course, is entitled to an exemption of \$1200.00 assessed value on account of his insanity, and has benefited only to the extent of \$369.00, and it will appear therefore, that he lacks \$804.00 assessed valuation of getting his full \$1200.00 valuation exemption, and the question is whether or not I will be permitted to grant any further exemptions out of his homestead, to make up this deficiency.

"To state the proposition a little more particular, Chilton County's tax rate is \$2.00 per hundred and the taxes on the 119 acres assessed at \$1104.00, is \$22.08; 65c of this \$2.00 is exempt under the homestead laws of \$7.18, leaving him liable for \$14.90 on the 119 acres. As to the remaining 48 acres the assessed value is \$396.00 and under the insane exemption law all of this is exempt to the taxpayer. It appears, therefore, that the taxpayer would only receive an exemption in taxes of \$7.95 under the insane exemption law, whereas, he is entitled to \$24.00 according to our tax rate, provided he has that much property and the question is whether or not this difference between \$24.00 and \$7.92 can be granted to him out of his homestead of 119 acres. If you hold that this can be done then I would like for you to give me some idea as to how this should be figured."

Construing Section 2(f) of the Revenue Act of Alabama, reported in the General Acts of Alabama, 1935, page 258, granting an exemption of real property to deaf mutes, insane and blind persons to the extent of \$2,000.00, and construing Act No. 107, Acts of 1936-37, page 113, granting a homestead exemption (to an insane person), this office held, in an opinion to Hon. John J. Flowers, Tax Assessor of Montgomery County, Montgomery, Alabama, reported in Volume 8, Quarterly Report of Attorney General, page 18 that "The exemptions are cumulative and that the eligible beneficiary in Section 2(f) is entitled to a homestead exemption of \$2,000.00 and a property exemption of \$1200.00 on his homestead if he elects that the latter exemption be so applied."

The cumulative effect of such dual exemptions, as applicable to the property mentioned in your inquiry, is to grant the claimant an exemption of \$25.95 on the total taxes of \$30.00 which he owes. The exemption may be explained as follows: The exemptioner may elect to claim as exempt from state and county taxes under Section 2(f), supra, (providing exemption to an insane person) the entire tract valued at \$396.00. After such exemption is granted the claimant is entitled under said Section 2(f) to additional exemption from state and county taxes of \$804.00 in assessed value to complete his authorized exemption of \$1200 in assessed value (Vol. III, Quarterly Report of the Attorney General, p. 67). This additional credit the exemptioner may apply to his homestead valued at \$1104.00, leaving thereon an assessed value of \$300.00 which is subject to exemption from State taxes **only—**

all payable at Montgomery, Alabama, with interest at no% until maturity and 8% after maturity, as stipulated therein, which notes I justly owe and hereby promise and agree to pay according to the tenor and effect thereof, do hereby grant, bargain, sell, mortgage and convey to said mortgagee, his heirs, successors and assigns, the following described property, now owned by me and in my possession upon the _____ of section _____, township _____, range _____, in _____ COUNTY, Alabama, to-wit:

One _____ Motor Truck, Model No. _____
 Chassis No. _____, Engine No. _____
 One F-12 Farmall Tractor, Engine No. F. S.-23193, Factory No. _____

together with all repairs, replacements of, and accessions to all of said property, including all increase of said live stock, and all wild or tame crops of every name, nature and description now growing, or hereafter planted, sown, grown, cultivated or harvested during the years 19____, 19____, 19____, 19____, upon the following described real estate now in my possession and control in the county of _____, Alabama, to wit:

_____ of Section _____, Township _____, Range _____
 _____ of Section _____, Township _____, Range _____
 _____ of Section _____, Township _____, Range _____

loss, if any, under insurance on any of said property payable to mortgagee as his interest may appear. This mortgage is a first lien upon all property above described _____

It is expressly agreed that on all grain and marketable crops hereinabove mortgaged, this mortgage may be foreclosed by sale thereof when harvested, in any usual or convenient market therefor, at any time, in the usual manner, at the market price thereof in such market, and without notice of foreclosure.

PROVIDED, HOWEVER, if I shall pay said debt and interest, then this mortgage shall be void; but if default be made in the payment of any of said notes, or any installment thereof or if I abuse, or misuse, or attempt to sell, remove or otherwise dispose of said mortgaged property, or any part thereof, or fail to take proper care thereof, or if said property or any part thereof shall be seized by process of law; or if at any time the mortgagee shall deem himself insecure, then the said mortgagee, or his agent is hereby authorized to declare the whole debt due and to enter upon the premises whereon said property, or any part thereof, may be, and take, remove, and sell the same at public or private sale, without notice and without demand of performance, at which sale the mortgagee may become the purchaser, and out of the proceeds the said mortgagee is hereby authorized to retain such amount as shall be sufficient to satisfy the said indebtedness, Ten Dollars (\$10) attorney's fees, and such expenses as shall have been necessarily incurred in the seizure, keeping and sale of said property, returning to me or my representatives any surplus, and if the proceeds of such sale are insufficient to satisfy said debt and interest, I agree to pay any deficiency. It is agreed that the said mortgagee retains in force all mortgages heretofore given, securing the same or any part of said indebtedness. It is further agreed that I am to remain in peaceable possession of said property until default in the conditions of this mortgage, and in consideration thereof I agree to keep the same in good condition at my own cost.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 7th day of October, 1936.

IN PRESENCE OF

J. D. Hall

Two
Witnesses
Necessary

C. F. Andrews (SEAL)

_____ (SEAL)

_____ (SEAL)

ASSIGNMENT

FOR A VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby assigns and transfers to _____

whose postoffice address is _____

all right, title and interest in and to the within chattel mortgage and the property there mortgaged.

In PRESENCE OF

Dated at _____ 19_____

_____ (Seal)"

Your inquiry is as follows:

"I don't know whether this is a new or second hand tractor. I don't know whether it is a sale to Andrews or whether Andrews gave Taylor Tractor & Implement Co. a mortgage on this tractor that he already owned for fertilizer or something else. I see no sign of a retention of title clause any more than is in most all mortgages, nor anything to show that this is a sale of the tractor, nor anything to indicate that there might have been a down payment. But I am submitting the mortgage to you in order that you may determine whether or not in your opinion a Probate Judge, after receiving a mortgage of this type through the mail for record should collect any tax other than mortgage tax. This particular form of mortgage has been considerable trouble to me, and I feel sure that it has to several other Probate Judges of the State. One Examiner will come and say that it is nothing but a plain mortgage, then another one will come and say that I should collect mortgage and bill of sale tax and charge it to me. If this mortgage does carry a bill of sale tax I want to know it."

The Supreme Court of Alabama in **Long, Judge, v. Jasper Land Company**, 217 Ala. 593, 117 So. 210, 211, has held that "The determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the Probate Judge."

An examination of the instrument submitted by you reveals that on its face it is merely a mortgage. It does not appear from the face of the instru-

ment that same is a conditional sale contract. As stated in **Thompson, Probate Judge v. Smith**, 174 So. 796; Cert. Den. by the Supreme Court of Alabama in **Thompson v. Smith**, 174 So. 797, the Probate Judge "may accept as prima facie correct the recitals of the deed (or mortgage, we interpolate) * * * and may act accordingly, in the absence of any fact or circumstances to the contrary, coming to his attention calculated to put on notice a reasonably prudent person."

If as you say, however, you are persuaded that the instrument submitted to you is so drawn as to avoid the payment of a tax and to disguise the real transaction, you are within your rights in ascertaining whether or not there was in fact a sale entered into between the parties and whether or not a cash payment was made on the purchase price of the article described in the instrument offered for recordation at the time of its purchase. Having ascertained by inquiry that there was in fact a sale and there was a cash payment, it becomes your duty to govern yourself by such information in determining upon the amount of tax which is to be imposed.

Your attention is especially directed to the opinions of the Supreme Court and of the Court of Appeals in the case of **Thompson v. Smith**, 174 So. 796, 797, supra, which opinions are especially enlightening on the subject at hand.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 3, 1938.

Hon. H. G. Boyd, Register,
Circuit Court, Tenth Judicial Circuit,
Birmingham, Alabama.

Court cost taxed against state, as complainant.

1. Cost upon decree of dismissal in Equity and taxing cost against complainant, the State, ex rel. Alabama State Milk Control Board, being complainant, should be paid from "Alabama State Milk Board Fund."

2. Cost upon decree of dismissal in Equity and taxing cost against complainant, the State, in re: E. T. Gullledge, as Agent of the Commissioner of Agriculture and Industries being complainant, should be paid from the "Agriculture Fund."

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 20, 1937, for my opinion as follows:

"I would appreciate an official opinion regarding the Court costs in the following cases, that is from what funds should the Court costs be paid:

"Case No. 40852, State of Alabama, Ex Rel Alabama State Milk Control Board vs. A. W. Jones and G. C. Prewett, d/b Shady Grove Dairy.

"A decree of dismissal was rendered in this cause under date of April 15, 1937, taxing the costs against the Complainant.

"Case No. 40265, State of Alabama, Ex Rel The Alabama State Milk Control Board vs. H. G. Franklin.

"A decree of dismissal was rendered in this case under date of April 8, 1937, taxing the costs against the Complainant.

"Case No. 40746, State of Alabama, In Re: E. T. Gulledge, as Agent of the Commissioner of Agriculture and Industries of the State of Alabama vs. Golden Sunrise Natures Health Food & Age-Lax Natures Health Foods.

"A decree of dismissal was rendered in this cause under date of April 15, 1937, taxing the costs against the Complainant."

Section 6518 of the Code of Alabama 1923, provides as follows:

"The state may sue in the circuit court in chancery or equity matters, and the suit is governed by the same rules as suits between individuals. The solicitor of the circuit in which the suit is pending must attend to the same on the part of the state, and the governor may employ assistant counsel, if he deem it necessary and the circuit judge may determine the amount of compensation; and if unsuccessful, the state is liable for costs as individual suitors are. The direction of the executive of the state in writing is sufficient authority to the attorney for bringing such suit."

General Acts 1935, page 214, Section 17, establishes and provides for the "State Milk Control Board Fund" and requires the payment of all receipts from the operation of the Milk Control Board Act to the treasury as a part of said "State Milk Board Fund." Said Section further reads in part as follows: "all such money is hereby appropriated to defray the expense incurred in carrying out and enforcing powers and duties granted and imposed by this Act, which shall be paid out of the treasury upon vouchers drawn by the Board." In addition to the above, the whole Act shows the intent to make the work of this Board self-sustaining and to appropriate to its use all of the revenues received from the operation of said Act.

It is my opinion that the cost in the first two cases, referring to the Milk Control Board cases, should be paid from the "State Milk Board Fund," upon presentation of claim for said cost, in due and legal form.

The costs in the last case set out in your request, referring to the Commissioner of Agriculture and Industries, should be paid by the Department of Agriculture and Industries from the "Agricultural Fund." It is my opinion that said payment is authorized under Section 488 of the Agricultural Code, as amended by General Acts 1935, page 24, from which the following is an excerpt:

"The Commissioner of Agriculture and Industries, with the approval of the State Board of Agriculture, shall use the Agricultural Fund in accordance with the provisions of law for the support and expense of the regulatory, control and administrative work of the Agricultural Section of the Department and in such manner as said Board deems will best effect the purposes of all laws included in said Agricultural Section."

You are referred to opinion, Biennial Report of the Attorney General, 1920-1922, page 140, which clearly sets out the authority of the Department of Agriculture and Industries to pay costs in suits filed upon its behalf in the name of the State and which are successfully prosecuted. The reasons therein stated apply with as much or more force when the suit is dismissed and the costs taxed against the complainant. The provisions of the laws relating to the Department of Agriculture and Industries, cited in said opinion and contained in General Acts of 1919, were brought forward in the Agricultural Code of 1923 and, with the same effect, to the Agricultural Code of 1927. The present laws, in the same manner as the 1919 laws, appropriate all funds, including fines and penalties in most cases, received from the operation of the Agricultural Code to the Agricultural Fund. Said court costs should be paid in accordance with the provisions contained in Section 28, General Acts 1935, page 25, providing for the method of payment of expenses incurred under the Agricultural Code of Alabama.

Although, said State Milk Board and Department of Agriculture and Industries, respectively, should pay said cost, upon due presentation of claims, they are branches of the State Government and are not subject to execution for said cost. Also the above is not to be taken as in conflict with the case of State ex rel. Stow vs. City Council, 74 Ala. 226, holding that the cost cannot be taxed against the State, the suit being in the name of the State by an individual.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Taxation—Refund of taxes paid on property exempt as a homestead—Section 296, Chapter 6, Article VIII, General Acts 1935, p. 379.

Taxpayer who, though mistake or errors, pays 1936-1937 taxes without receiving credit thereon for homestead exemption lawfully claimed and allowed is entitled to refund of the excess.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your communication of recent date, which is as follows:

"I am attaching hereto, a copy of petition for refund which has this date been received by me, same being sent by the Petitioner, Luella Williams, of Mobile County, Alabama.

"The petitioner avers that through error, she failed to make a deduction of the sum of \$1.95 representing the amount alleged to be due her by virtue of the Homestead exemption: I quote from the petition, i. e.

' * * * through mistake or error, or by reason of double assessment or other error made by Tax Collector taxes which were not due and collectible upon the property of the Petitioner: that said payment was not made voluntarily by Petitioner with full knowledge of the facts and that said payment as made on account of **petitioner paid 1937 taxes in full without having presented her credit certificate covering homestead exemption amounting to \$1.95 etc.** * * *'

"Please advise me if a refund in a case of this kind may be made under and in accordance with Section 296, Chapter 6, Article 8, on page 124 of the 1935 Revenue Code of Alabama."

It is my opinion that the applicant whose name is signed to the petition for a refund, which petition is attached to your letter, is entitled to the refund. I assume that the statements made in the said petition are true and correct, and that the applicant had lawfully claimed her homestead as exempt, and had received a credit memorandum therefor issued pursuant to an opinion of this office to Hon. T. L. McKee, Tax Collector, Chilton County, Clanton, Alabama, dated September 23, 1937, appearing in Volume VIII of Quarterly Report of Attorney General, p. 292, and that she failed to receive credit for the amount of such certificate when she paid her taxes.

In the opinion to Mr. T. L. McKee, *supra*, this office held as follows:

"The failure of the tax assessors separately to list and value the homestead and to credit the taxpayer with an amount equal to the state taxes on such homestead necessitated, after the rendition of the foregoing opinion, issuance of a proper credit on the amount of the taxes certified by the tax assessor to the tax collector as being due by the taxpayer. A certification without such credit was an error on the part of the tax assessor which he is authorized to correct."

The certificate which the tax assessor issued was a credit upon the amount of applicant's taxes which he certified to the tax collector as being due.

Presentation of the certificate is merely evidence of such credit. The payment of the full amount of taxes on the homestead without regard to the exemption was an error and such excess may be lawfully refunded pursuant to the authority contained in Section 296, Chapter 6, Article VIII, General Acts 1935, p. 379, which I quote as follows:

"Section 296. Any taxpayer who through any mistake, or by reason of any double assessment, or by any error, in the assessment or collection of taxes, or other error, has paid taxes that were not due upon

the property of such taxpayer, shall, unless such tax was with knowledge of the facts voluntarily paid by the taxpayer, be entitled, upon making proof to the satisfaction of the State Comptroller of such payment, to have such taxes refunded to him if application shall be made therefor, as hereinafter provided, within two years from the date of such payment."

I, therefore, conclude that you are lawfully authorized to make such refund. The State of Alabama has received taxes to which it was not lawfully entitled, and to which no claim was made. The payment in my judgment was such an error as is contemplated by Section 296, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. R. A. Leath, Sheriff,
Etowah County,
Gadsden, Alabama.

Fees—Fees of sheriff serving process issued by Juvenile Court governed by Section 3558.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of inquiry, which is as follows:

"Please give me your official opinion how Etowah County should pay the Sheriffs for serving process issued by the Juvenile Court. I will thank you to give me this opinion as early as possible as the Board of Revenue of this County is holding my fees, waiting for an opinion from you."

As the Juvenile Court of Etowah County operates under the general statute, I refer you to Section 3558 of the Code of Alabama, 1923 for the provision governing costs. Said section is as follows:

"Section 3585. OFFICER SERVING PROCESS, ETC., UNDER JUVENILE COURTS: COSTS AND FEES OF.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction." (Italics supplied).

I also refer you to Quarterly Reports of Attorney General, Volume 2, page 28.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 4, 1938

Hon. Harry Simon,
Chief Clerk, License Division,
State Tax Commission,
CAPITOL.

Taxation—License—Act 231, General Acts of 1937, page 279,
Schedule 123½.

Payment of privilege license to wholesale lumber imposed by
Schedule 84, Section 348, Act No. 194 (Revenue Act), General Acts
of 1935, page 256, exempts all planing plants of licensee from license
imposed by Schedule 123½, supra.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

You have transmitted to me the following inquiry:

"The Smith Lumber Company, of Red Bay, Alabama, own and operate a planing mill at Red Bay and Nauvoo. Under the provisions of Schedule No. 84 of an Act entitled 'An Act to provide for the general revenue of the State of Alabama' they procured a wholesale lumber yard license for their plant located at Red Bay. House Bill 182, approved March 2, 1937, levies a privilege license on planing mills, which is Schedule 123½. Since they procured such wholesale lumber dealer's license for their plant at Red Bay, are they required to obtain a license under Schedule 123½ for either of the two mentioned plants?"

It is my opinion that Smith Lumber Company is not subject to the payment of license for operation of either planing plant mentioned in the above inquiry.

Act No. 231, approved March 2, 1937, appearing in General Acts of 1936-37, page 279, imposes a license tax upon "each person, firm or corporation engaged in the operation of a veneer mill, planing mill, box factory, handle factory, or any other factory where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill licensed under Schedule 123," but has incorporated therein the following provision:

"It is the intention hereof that where a person, firm or corporation shall pay a privilege tax under Schedule 123 or Schedule 84, then no privilege license shall be charged or collected hereunder."

The payment by Smith Lumber Company of a license under Schedule 84, Revenue Act of Alabama, which imposes a license tax for the operation of a wholesale lumber plant, carries with it an exemption from the license tax imposed by said Schedule 123½, supra, for the operation of the two planing plants mentioned in your inquiry. The exemption is mandatory under the provisions of said Act No. 231.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 5, 1938

Hon. M. W. Forman,
Judge of Probate,
Ashville, Alabama.

Person attending court in response to a subpoena duly issued is entitled to per diem and mileage, even though his services are not required and he is excused for any cause.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 15, 1937, in which you request my opinion as follows:

"We have had a non compos mentis hearing in this Court and one of the jurors who was summoned was disqualified because he was related to the wife of the insane man. Please advise me whether or not this disqualified juror is entitled to pay even though he did not sit at the hearing."

I am of the opinion that the juror mentioned in your letter is entitled to pay, even though he did not sit at the hearing. A person attending court in response to a subpoena duly issued is entitled to per diem and mileage, even though his services are not required and he is excused for any cause.

This conclusion is in accordance with an opinion heretofore rendered by this office on September 10, 1935 and found in Vol. VI-A, Office Edition of the Attorney General.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 6, 1938

Hon. M. H. Harper, Chairman,
Unemployment Compensation Commission,
Montgomery, Alabama.

Unemployment Compensation Commission—Benefits—Eligibility—
Held employees unemployed prior to January 1, 1938, as well as employees becoming unemployed after January 1, 1938, all of whom have met the requirements of law, entitled to benefit as provided for by the Unemployment Compensation Law.

Opinion by Assistant Attorney General Small.

Dear Sir:

In reply to your request for an official opinion of this office which is as follows:

"I respectfully request your opinion as to whether or not workers who are out of employment prior to January 1, 1938, who remain unem-

ployed thereafter, and who have accumulated wage credits under the Unemployment Compensation Act, are entitled to receive benefits after January 1, 1938. Stated in another manner, must an employee become unemployed after January 1, 1938, in order to be eligible for benefits under the Alabama Unemployment Compensation Act."

I wish to advise that in my judgment, your inquiry should be answered in the negative. I wish to refer you to the Alabama Unemployment Compensation Act, Acts of 1935, page 950, as amended by the Acts, Extra Session, 1936-1937, page 217, which provides in part as follows:

"An employee shall be deemed eligible for benefits for a given week of his unemployment only if he has within the first three of the last four completed calendar quarters immediately preceding the first day of his benefit year earned wages for employment by employers equal to not less than sixteen times his weekly benefit amount."

In my judgment, Section 6(a) quoted above must be construed in conjunction with Section 5(a) prescribing payments of benefits. Said Section 5(a) provides in part as follows:

" * * * after contributions have been due under this act for two years, benefits shall become payable from the fund to any employee who thereafter is or becomes unemployed and eligible for benefits."

You will note that the words "any employee who thereafter is or becomes unemployed", (emphasis supplied), must necessarily include employees who become unemployed in 1937 and continue unemployed after January 1, 1938.

It is my opinion that the legislature intended that the benefit provisions of this law should become effective January 1, 1938, and that those persons then or thereafter unemployed who have within the first three out of the last four completed calendar quarters immediately preceding the first day of January, 1938, earned wages equal to not less than sixteen times their weekly benefit amounts; who have completed since January 1, 1938, a "waiting period" of unemployment as defined by law; who have registered for work; and who have met all the other requirements prerequisite to qualifying for benefits, shall, at the expiration of the required waiting period, be eligible for benefit payments.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. Sam Drinkard,
Tax Collector,
Marengo County,
Linden, Alabama.

The claim of a state witness in a criminal case that has been properly and duly registered or certified must be paid out of the fine

and forfeiture fund where such witness certificates are a claim against the fine and forfeiture fund, in preference to all other claims of officers until there is a sufficient surplus in the fine and forfeiture fund to take care of all outstanding registered witness certificates; and claims or witness certificates in the hands of a third party duly registered are on the same basis with other witness claims as to this fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 10, 1937, in which you request my opinion as follows:

"Please render me an official opinion on the following facts:—

"When officers fees are registered against the fine and forfeiture fund of the county, are state witness claims which may be registered at any time before a surplus arises in this fund to pay said claims a preferred claim against said fund over officers claims registered regardless of date of registration of said claims?

"I registered, as Sheriff of Marengo County, certain claims against the fine and forfeiture fund of Marengo County in 1932 and later, are state witness certificates which are registered at this time a preferred claim over my claim which were registered as late as 1932 should a surplus have not arisen in said fund since the filing of my claims.

"Should state witness certificates which are not in the hands of the original owners be a preferred claim over officers fees registered against the fine and forfeiture fund regardless of the date of registration?

"I will thank you very much to give this matter your immediate attention."

It appears to me that all of your questions can be answered in one. You will note Section 4039, Code of Alabama, 1928 (Michie's) provides, among other things:

"Section 4039. Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found' * * *"

It appears from the above that witness claims when registered become preferred above all other claims up and until there is a surplus arising in said fund and when this surplus does arise, then officers' claims are payable. But witness claims must be registered, if not, they are not clothed with this priority. *Stone v. Ames*, 91 Ala. 644, *Mims v. State*, 180 Ala. 511.

I do not think that the registration of officers' claims can ever make them prior claims against the fine and forfeiture fund of the county over witness claims without regard to the date of registration of such claim. Section 4039, supra, says: "Registered claims of witnesses" and does not say prior registered witness claims.

Therefore, it is my opinion that there must arise such a surplus above all registered witness claims without regard to the date of registration. I do not think it matters whether or not the witness claims are in the hands of a third party if they are duly registered. They come in against this fund as other registered witness claims.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. C. E. McNatt, Clerk,
Circuit Court, Franklin County,
Russellville, Ala.

General Acts of 1936-1937, page 230, Section 2, relating to fines for violation of Act prohibiting driving while intoxicated.

1. Forfeitures in cases for violation of said Act are payable to funds of State Highway Department.

Opinion by Assistant Attorney General Flurry.

Dear Sir:

I have your request of September 20, 1937, as follows:

"Section 2 of the General Act of the Legislature of 1936-37, pages 229, 230 provides as follows:

"All fines collected for the violation of this Act shall be paid into the Highway Patrol Fund, as now provided by law".

"If a person executes an appearance bond on a charge of driving a motor vehicle upon a highway while intoxicated and forfeits the bond by failing to appear in court and the forfeiture is made final and collected, please advise me to whom I should pay the funds collected in the forfeiture case? Does the money collected in the forfeiture case go to the fine and forfeiture fund of the county, to the state highway department or to the highway patrol fund?"

The Highway Code of 1927, General Acts 1927, page 365, prohibited any person driving any vehicle upon any highway within this state, while intoxicated, and assessed penalties for the violation thereof.

Said Acts, pages 390, 391, provided that "all fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with the violation of any of the provisions of this article constituting a misdemeanor shall be within thirty days after such fine, or forfeiture is collected, forwarded to the state treasurer. All amounts received from such fines, or forfeitures shall be credited to the funds of the State Highway Department, for the maintenance of roads and bridges".

In 1935 the legislature passed the State Highway Patrol Act, General Acts of 1935, page 756. This Act does not treat the subject matter contained in Acts of 1927, page 365, relating to driving while intoxicated. The Highway Patrol Act provides authority for revoking the license of persons driving upon the highway while intoxicated. It further authorizes the state Highway Commission, with the approval of the Governor, to establish rules and regulations concerning the operation of motor vehicles upon the highways. This could not authorize the highway commission to supersede said provisions of the 1927 Act, with a regulation and thereby supersede the penalty provided for in the 1927 Act with the penalty provided for in cases of violation of regulations established by the Highway Commission.

The following is an excerpt from Section 8 of the Highway Patrol Act:

"The said moneys shall be kept in a separate fund in the state treasury to be known as the 'Highway Patrol Fund'. Fines and forfeitures imposed upon persons violating the provisions of this Act shall be rendered into the said Highway Patrol Fund by the officers of the several courts".

The above excerpt refers to fines and forfeitures arising out of violations of the provisions of the Highway Patrol Act, and no others. A prosecution for driving upon the highways of this state while intoxicated would be under and by virtue of the provisions contained in the Highway Code, General Acts 1927, page 365. Therefore, the fines and forfeitures arising out of said violations would be controlled as to their disposition by Acts 1927, pages 390-391, hereinabove quoted and would go to the funds of the State Highway Department instead of to the "Highway Patrol Fund".

The above sets out the status of said fines and forfeitures prior to the enactment by the legislature of the fund provisions contained in General and Local Acts, 1936, 1937, pages 229, 230. Said Act treats the subject of driving while intoxicated upon any highway of this state and prohibits the same and provides the penalties for violations thereof. It is almost identical with the language used in General Acts 1927, page 365. Section 1 of said Act is not repugnant to or inconsistent with the said provisions of the 1927 Act. However, it is an affirmative statute revising the entire subject matter of the Section of the 1927 Act, treating driving upon highways while intoxicated and above referred to. The legislature, no doubt, intended said Section 1 as a substitute for the 1927 Section.

Edison v. State, 134 Ala. 50, 32 So. 308.

State v. Kirkpatrick, 95 So. 490, 209 Ala. 96.

Section 3 of the 1936-37 Act reads:

"All laws or parts of laws in conflict herewith are expressly repealed."

Although there is no repugnancy in the said 1936-37 Act to the 1927 provision, it is my opinion that the 1936-37 Act repealed the provisions hereinbefore referred to in the 1927 Act, or Highway Code, by substituting therefore, the provisions contained in Section 1 of the 1936-37 Act.

Section 2 of the 1936-37 Act is as follows:

"All fines collected for the violation of this Act shall be paid into the Highway Patrol Fund, as now provided by law."

Said Section 2 does not refer to forfeitures, but is limited to fines. Thereunder all fines collected for violations of the 1936-37 Act should be paid into the Highway Patrol Fund, as provided in said Section 2. This is not controlling as to forfeitures. Fines are not the same as forfeitures. Each has its distinct legal meaning. This has been recognized by the legislature in many Acts. For example, Chapter 134, Sections 4038-4042, refers to fines and forfeitures, and recognizes that the two are separate and distinct funds. The provisions of the 1927 Act, Highway Code, refer to the collection of fines and forfeitures collected upon conviction or upon forfeiture of bail. The Highway Patrol Act also refers to fines and forfeitures. There is a clear legislative intent to include in said instances funds received from fines upon conviction and also funds received from forfeiture or bail. This is not true under Section 2 of the said Act of 1936-37. Forfeitures collected for the violation of said Act do not go to the Highway Patrol Fund.

It is my opinion that funds received from forfeitures in the Circuit Court upon charges of violating Section 1 of said Act of 1936-37, should be credited to the funds of the State Highway Department to be used in accordance with the provisions of the Section of the Highway Code, Acts of 1927, page 390, 391. Said Section 1 replaces or is substituted for the former provisions of law with reference to driving upon any highway of this state while intoxicated, as above expressed. This being true the provision with reference to the disposition of forfeitures by the 1927 Act, remain applicable to the violations of said Section 1, 1936-37 Act, in respect to driving any motor vehicle upon any highway of this state, while intoxicated.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. Henry S. Long, Chairman,
The State Tax Commission,
Montgomery, Alabama.

1. Homestead exemption from taxes—Property leased to another prior to October 1, 1936, cannot be claimed as exempt from taxes for tax year 1936-37.

2. Claim of homestead filed pursuant to Article 2, Chapter 292 of the Code of 1923, is not conclusive as to status of homestead, but may be considered along with other evidence to determine status of property.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of November 30th, in which you request my opinion as follows:

"The following questions have been presented in regard to the allowance of exemptions under the provisions of Act No. 107, General Acts 1936-1937, page 113.

"The owner of a house and lot in a city or town formerly occupied the property as a homestead. Prior to October 1st, 1936, the owner thereof moved away from the county in which the property is located (in some cases moved away from the State). Prior to October 1st, 1936, the owner rented or leased the property to another and placed the renter or lessee in peaceable possession thereof under the terms of a rental or lease contract whereby the renter or lessee may remain in possession of the property for as long as twelve months or more. Under the terms of the rental contract the owner of the property cannot repossess the property nor can he occupy it as a homestead during the life of the lease or rental contract, except upon default of the lessee.

"1. Can the owner of such property obtain exemption from State taxes within the limits of the law for the tax year commencing October 1st, 1936, or for any tax year during which the property is occupied by another during the conditions above stated?

"2. Does the filing of a declaration of claim in the probate office as provided by Article 2, Chapter 292 of the Code of 1923 affect the status of the property described above, insofar as the exemption under Act No. 107 is concerned?

"3. If the filing of a claim in the probate office in accordance with Article 2, Chapter 292, above, affects the status of the property for taxation, when should the claim be filed?

"4. Can it be filed after the expiration of the assessing period in which the property is sought to be taxed or must it be filed before the lien for taxes attaches, that is to say, before October 1st of the tax year?

"5. Is there not a distinction between the liability of property for assessment of taxes and the liability of property to sale for the payment of debts in that the liability for assessment or exemption from taxes is recurrent annually and the liability for sale or exemption from sale for debt is a matter dependent upon the duration of ownership?"

Your letter requests my opinion on propositions as to which there have arisen differences of opinion. For this reason, and to prevent possible misconstruction of this opinion, as well as of previous opinions, I feel it advisable to give a short resume of decisions of the Supreme Court and of previous opinions of this office which may be pertinent.

As you know, the act providing for the exemption of homesteads from taxes (Acts of 1936-37, page 113) provides:

"The word 'homestead' as herein used is the 'homestead' as now defined by the constitution and laws of the State of Alabama."

Homestead is defined by the Constitution of 1901, in Section 205, which provides:

"Every homestead, not exceeding 80 acres, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any town, city, or village, or in lieu thereof, at the option of the owner, any lot in the city, town, or village, with the dwelling and appurtenances thereon, **owned and occupied by any resident of this state**, and not exceeding the value of two thousand dollars, shall be exempt" etc.

This definition of a homestead has been construed by the Supreme Court in the case of *Miller v. Marx*, 55 Ala. 322, where it was held that under this Section the Legislature might increase the area of the homestead, but could not diminish it. Sections 206 and 208 of the Constitution also provide for certain homestead exemptions, but in neither section is a homestead defined.

The statutes of Alabama with reference to homestead and other exemptions are contained in Chapter 292 of the Code of 1923. Article 1, thereof (Code Sec. 7882-7889) provides for certain exemptions from levy and sale under process. Section 7882 provides for an exemption of homesteads from levy and sale under process and defines a homestead as follows:

"The homestead of every resident of this state, with the improvements and appurtenances, not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be, to the extent of any interest he may have therein, whether a fee or less estate, or whether held in common or in severalty, exempt from levy and sale under execution or other process for the collection of debts during his life and **occupancy**, and if he leave surviving him a widow and a minor child, or children, or either, during the life of the widow and minority of the child or children; but the area of the homestead shall not be enlarged by reason of any encumbrance thereon, or of the character of the estate or interest owned therein by him."

Article 2, Chapter 292 (Code Sections 7890 to 7917) provide for the claim and contest of exemption.

Article 3 (Code Sections 7918-7926) provides for the exemption from administration and payment of debts of a decedent. Section 7918 contained in said Article 3 provides:

"7918. The homestead of any resident of this state, leaving surviving him at his death a widow and minor child or children, or either, with the improvements and appurtenances not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be exempt from administration and the payment of debts in favor of such widow and minor children" etc.

There are contained in Articles 1, 2 and 3 of Chapter 292 numerous administrative and procedural provisions affecting the claim and contest of claim of homestead exemptions. Among these provisions is contained Sec-

tion 7890, which provides for the filing of a declaration of claim of homestead or other exemption from levy and sale under process. This section has been held not to be applicable where selection is not necessary. **Alley v. Daniel**, 75 Ala. 403-406. Under the provisions of Section 7892 the filing of such claim of exemption shall be taken and considered as *prima facie* correct and under Section 7894 where the declaration is filed for record the property therein described is not subject to levy unless it is successfully contested as provided by Section 7895, et seq.

Section 7914 provides:

"When a declaration of claim to a homestead exemption has been filed in the office of the judge of probate, leaving the homestead temporarily, or a leasing of the same, shall not operate an abandonment thereof, or render it subject to levy and sale; but the right thereto shall remain the same as if the actual occupancy thereof had continued."

Article 3, with reference to the exemption of homestead from administration and payment of debts, also contains procedural statutes providing for the setting apart of homesteads to widows and minor children. Section 7952 provides:

"When homestead exemption has been allotted to the widow and minor child or children, or either, under any of the provisions of this Chapter, they shall not be held to have abandoned or forfeited the same by a removal therefrom."

I have set out the purport of most of these sections to show the impracticability of adopting all of them as applicable to the claim of exemption from taxes. You will note that the Act of 1936-37, page 113, above referred to, does not make applicable to claim of exemption from taxes all of the statutes with reference to claim of homestead exemptions from levy and sale or from administration and payment of debts. It merely adopts the definition of "homestead" as given by the previous statutes defining such "homestead". It is my opinion that the administrative and procedural statutes, as contradistinguished from those definitive of the word "homestead" are not adopted by the taxation exemption statute. This conclusion is strengthened by Section 7917, which draws a distinction between the right and the mode of remedy for asserting the homestead right. This section is as follows:

"7917. The right of homestead or other exemption shall be governed by the law of force when the debt or demand was created; but the mode or remedy for asserting, ascertaining, contesting, and determining claims thereto shall be as prescribed in this chapter."

It is also strengthened by the decision of the Supreme Court in **Sewell v. Sewell**, 156 Ala. 619, where the Supreme Court in a claim of widow's homestead exemption held that Section 2065 of the Code of 1896, which is now Section 7914 of the Code of 1927, "relates exclusively to homestead exemption against levy and sale under process" and has no application to a claim of homestead exemption from administration and payment of debts. Following such decision, the conclusion must be reached that the procedure for asserting homestead exemption from levy and sale under process as set out in Articles 1 and 2 of Chapter 292, and the procedure for claiming homestead

exemption from administration and payment of debts as set out in Article 3 of Chapter 292, are not applicable to the claim of homestead exemption from taxes.

This is further supported by the fact that the Legislature has already provided the mode of claiming homestead exemption from taxes by requiring that such homesteads be listed separately on the return for tax assessment. See Acts of 1936, Special Session, page 4.

Having determined this and before proceeding to a consideration of the direct questions asked in your letter I feel it advisable to set out the pertinent prior opinions of this office. It has been decided by this office that the right of exemption is to be determined by the status as of the time of assessment, that is, October 1, 1936, as to 1937 taxes. Quarterly Reports Vol. 8, page 62; Quarterly Reports Vol. 8, page 66-G; Quarterly Reports Vol. 8, page 267; opinion to J. W. Hamilton of Dec. 1, 1937.

It has also been held that a person cannot select a homestead out of land not occupied. Quarterly Reports Vol. 8, page 97.

"Act No. 107, General Acts of 1936-37, p. 113, which authorizes exemption of homesteads from the payment of State taxes, defines a homestead as that which is defined by the Constitution and laws of Alabama.

"The laws of Alabama require actual occupancy of property as a necessary incident to a homestead. The Courts have construed actual occupancy as existing when disconnected tracts are farmed in connection with each other and for the common support of the family. *Dicus v. Hall*, 3 So. 239, 38 Ala. 159. See opinion of this office to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama, dated the 10th day of August, 1937. **Actual occupancy, except in cases of temporary absence, is essential to constitution and retention of homestead in Alabama. *Hodges v. Hodges*, 77 So. 741, 201 Ala. 215."** (Emphasis ours).

To the same effect see the opinion of this office to the Hon. B. M. Davis of November 2, 1937, where it was stated:

"A Homestead must be the place of actual residence.

"*McConnaughy v. Baxter*, 55, Ala. 379;

David's Adm'r v. David, 56 Ala. 49;

Preiss v. Campbell, 59 Ala. 635;

Waugh v. Montgomery, 67 Ala. 573.

"The case of *Wildman v. Means*, 94 So. 823, 208 Ala. 487, holds that:

'Where the mortgagor of a U. S. homestead entry land maintained his home on the place where his wife lived, but not on the homestead entry mortgaged, but he satisfied the requirements of the laws of the U. S. by having his mother and sisters live on it, his homestead entry land was not his homestead within Constitution 1901, Section 250, of the Laws of the State'."

The question of the right of claimant to an exemption where there was an absence or a claimed abandonment was treated in Quarterly Reports Vol. 8, page 57; Quarterly Reports Vol. 8, page 268; Quarterly Reports Vol. 8, page 317. In the latter opinion it was ruled that the intent to make the property the permanent home would govern. In Quarterly Reports Vol. 8, page 268 it was held that abandonment of homestead was a question of fact and that "the surrounding circumstances and the *bona fide* intent of the taxpayer must be considered." In Quarterly Reports Vol. 8, page 57 it was also held that abandonment, leaving a gratuitous occupant in possession of the property was a question of fact to be determined from the intention of the owner. I therefore quoted from the case of **Fuller v. American Supply Co.**, 185 Ala. 512, and I again refer you to this quotation.

In two opinions reported in Quarterly Reports Vol. 8, page 88 and page 268 I held that the rental of a portion of the premises did not deprive the property of its character as a homestead. In those opinions the owner actually occupied the balance of the property.

A very similar question was presented in the opinion in Quarterly Reports Vol. 8, page 118. In that case the owner apparently rented out the entire home, but reserved to herself certain rooms in the house, in which she kept her furniture and which she actually occupied during several months of the year. She was, therefore, entitled to and actually did occupy a portion of the premises and the facts were, therefore, similar to the facts presented for my consideration in the opinions reported at pages 88 and 268.

Citing the case of **Fuller v. American Supply Co.**, at 185 Ala. 512, I reached the same conclusion as the previous opinions, that the exemptioner was entitled to exemption. In support thereof, I also cited Section 7914 of the Code. The same conclusion is reached without giving effect to Section 7914.

None of these opinions is determinative of the questions here presented. I, therefore, proceed to a consideration of the questions and decide the same on the facts set out in your letter.

1. According to these facts, the owner in question did not occupy the property on October 1, 1936, but prior to that date rented the property to another who had the possession and the right to possess for 12 months or more. Since the owner did not occupy the premises on October 1, 1936, the determinative date, the property does not come within the definition of a homestead as defined by the Constitution and laws of the State of Alabama, set out above, unless the definition is to be changed by Code Section 7914. In my opinion, this Section 7914 does not change the definition of homestead so that property not occupied, but leased to another, may be claimed as exempt from taxes. In my opinion, this Code Section 7914 permitting the lease of a homestead is restricted in effect to exemption from levy and sale under process and should not be extended so as to affect a right of exemption from state taxes. In reaching this conclusion I have borne in mind the fact that exemptions from taxation must be strictly construed against such exemptioner and in favor of the taxing authorities. **Elba Bank & Trust v. State**, 91 So. 991.

In answer to your first question, therefore, I advise you that, in my opinion the owner of such property on the facts set out in your letter cannot obtain exemption from state taxes during the tax year commencing October

1, 1936. It is further my opinion that he cannot obtain exemption for any tax year during which the property is occupied by another under a valid lease.

2. I believe I have already answered your second question above. In my opinion, the filing of a declaration of claim as provided by Article 2, Chapter 292, of the Code of 1923, providing the mode and remedy of obtaining exemption from levy and sale under process does not affect the status of the property or the rights to exemption from taxation. It is merely evidence which may be considered by the tax assessor.

3 and 4. Having reached this conclusion there is no necessity for answering questions numbered 3 and 4.

5. In my opinion, there is a distinction between the liability of property for assessment of taxes, and the liability of property to sale for the payment of debt. Stated another way, there is a distinction between the right of exemption from taxes and the right of exemption from levy and sale under process or right of exemption from administration and payment of debts. The Legislature has provided in Article 2 of Chapter 292, for certain procedure under which a claim for exemption from levy and sale under process may be made. This right of exemption from levy and sale is determinable at the time when the execution lien attaches. Any event subsequently occurring would not operate to support or defeat the right of exemption. **McCrary v. Chase & Co.**, 71 Ala. 540; **Hines v. Duncan**, 79 Ala. 112; **Block v. George**, 84 Ala. 178.

The filing of the declaration provided by Section 7914 is *prima facie* evidence of an intention to return and the status of the domicile as a homestead is presumed to continue until a change *facto et animo* is shown. **Caldwell v. Pollak**, 91 Ala. 353-355, 80 So. 546-547; **Powers Clothing Co. v. Smith**, 202 Ala. 634, 81 So. 576. These cases, however, in my opinion, have no effect upon the claim for homestead exemption under the law requiring the assessment of such property for the right to homestead must be determined as of October 1 of each successive year. It is the duty of the tax assessor to determine at that time the status of the property as a homestead. He is entitled to take into consideration any claim of homestead filed in the Probate Court or any decree of the Probate Court allotting the same as a homestead, but this should be considered along with all other evidence. If, upon considering such evidence, it appears that the person claiming such homestead is not entitled to occupancy as of October 1, then such exemption as a homestead should be denied.

Compare opinion in Quarterly Reports Vol. 8, page 285, holding that if the person claiming the homestead is not in actual or constructive occupancy thereof he would not be entitled to claim the property as a homestead. Compare also the opinion in Quarterly Reports Vol. 8, page 286, holding that it is not necessary to file a claim for homestead exemption under Code Sections 7890-7894 in order to secure the benefits of the exemption from taxes, but such claim filed in order to secure exemption from levy and sale under process would be merely evidence to be considered by the assessor in determining whether such property is a homestead.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 7, 1938

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

License tax: Schedule 96 of Section 348 of Act No. 194, approved July 10, 1935, General Acts 1935, pages 256, 482, requires a moving picture company operating two movie houses to obtain a license for each picture house.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 20, 1937, requesting my opinion as follows:

"There are at present two motion picture shows in operation in Fort Payne, namely: The DeKalb Theatre and The Strand Theatre. Both shows are owned and operated by a corporation. The DeKalb Amusement Company, Incorporated.

"Schedule No. 96: 'Every person engaged or continuing in the business of operating a moving picture show or show of like character to which admission is charged.' etc.

"DeKalb Amusement Company raised the issue that under the terms of this schedule they should be allowed to operate both shows on one license. The shows are operated contemporaneously. I will thank you to give me an opinion as to whether they should buy license for each show or they could, under the law, operate both shows on one license."

Answering your inquiry as to whether the DeKalb Amusement Company, under the provisions of Section 96 of license schedule as contained in General Acts of the Legislature, Regular Session 1935, pae 482, should procure license for each of two theatres, the DeKalb Theatre and the Strand Theatre, which are operated in separate houses or places in the City of Fort Payne, Alabama, or should be permitted to operate both of the same under one license, you are advised that, in my opinion, a separate license should be procured for each of said theatres, or motion picture shows.

Section 354 of the Revenue Act of 1935 (Simon's Revenue Laws of Alabama, pages 446-447) provides:

"Section 354. Every license granting authority to engage in or exercise any business, employment or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment or profession at some specified house or other definite place within the county of the Probate Judge granting it. Engaging in or exercising any such license, business, employment, or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment or profession is limited thereto by law, shall be void."

In the case of *Jebeles et al. v. State*, 117 Ala. 174, 23 So. 676, the question under consideration by the Supreme Court of Alabama was whether or not

a person engaging in the business of selling cigarettes at two separate and distinct places in the City of Anniston should be required to procure license for that purpose for each of said places of business; and, in said case, the Supreme Court, speaking through Mr. Justice Haralson, said:

"It seems very clear that under this license, the appellants could not carry on the business authorized in more than one place in the City. If so, the purpose of the statute, which was to raise revenue,—and, in so far as it gives the better supervision over the dealers by police authorities,—might be largely defeated. If they might sell in two places as claimed, they might sell in an indefinite number of places. In analogous cases of dealers in intoxicating liquors, licensed to sell in a given town, it has been held, that they cannot carry on the business at more than one place. *State v. Walker*, 16 Me. 241; *State v. Gerhardt*, 48 N. C. 178; 11 Am. & Eng. Law, 644, 645."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 17, 1938

Hon. M. E. Pritchett,
Tax Assessor,
Marengo County,
Linden, Alabama.

Taxation—Homestead—Act No. 107, Acts 1936-37, page 113.

Vendee of real property occupied as a homestead cannot claim homestead exemption until he has assessed the exempt property in his own name.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"On November 4th, 1936, Mr. A. L. Null made two assessments to his mother, Mrs. A. D. Null. One covering house and lot in the City of Demopolis, Alabama, and the other farm property.

"Mrs. Null lives in Demopolis and has gotten homestead exemption on assessment of city property.

"Mr. Null bought the farm property from his mother about two years ago but continued to make the assessment in her name and now claims he is entitled to homestead exemption on the farm property as he has lived on and cultivated same for a number of years.

"As stated above both assessments are in the name of Mrs. A. D. Null and one exemption certificate has been issued.

"Please advise if Mr. Null will be entitled to homestead exemption on the farm property."

It is my opinion that the vendee mentioned in your letter cannot claim homestead exemption of the property until he has lawfully assessed it in his own name.

The vendee should return the property for taxation. General Revenue Acts of Alabama, 1935, Section 31, as amended Special Session of the Legislature, 1936, page 4. An assessment in the name of the vendor is not lawful. **State v. White Furniture Co.**, 206, Ala. 575, 97 So. 896. Therefore, the property cannot be lawfully sold for taxes until there has been a valid assessment. A sale under an invalid assessment would not lawfully jeopardize possession. A homestead exemption presupposes a valid assessment of the property occupied as a homestead; otherwise there would be no lawful jeopardy of possession by a sale for payment of state taxes. The homestead exemption seeks to protect title and possession against sale and disturbance for payment of state taxes.

In an opinion to Hon. Charles W. Lee, August 10, 1937, Quarterly Report of the Attorney General, Vol. VIII, page 64, there is contained the following statement: "The exemption should be allowed irrespective of the person to whom the property is assessed." This statement is withdrawn. It was not pertinent to the inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 18, 1938

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Counties—Deputy Solicitor of Bullock County cannot receive compensation for services rendered to the county but may receive actual expenses incurred in connection therewith.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 29, 1937, which is as follows:

"On March 12, 1936, W. E. McNair, Judge of Probate of Bullock County, Alabama, attempted to enter into a contract with the Southeastern Construction Company for the surfacing of the Union Springs-Montgomery Highway. This so-called contract was declared to be null and void by your opinion rendered upon the request of the Deputy Solicitor of

Bullock County, Alabama, made on April 12, 1937. After the contract was declared to be null and void the Court of County Commissioners employed the Deputy Solicitor to represent it in the capacity of Attorney to advertise for bids for the surfacing of the said road, to work out with the Highway Department the specifications to be placed in the advertisement for bids, and all other things necessary toward making and entering into a contract with some construction company according to law. Later a contract was made and entered into, according to law, for the surfacing of this road with the Couch Construction Company and it developed that the county had saved approximately \$10,000.00.

"After the work was completed by the Couch Construction Company, the Court of County Commissioners then called upon the Deputy Solicitor of Bullock County, to draft warrants to be paid from the gasoline fund in the sum of \$30,000.00, with which to pay the Couch Construction Company for the surfacing of said road. In performing this work for the County, the Deputy Solicitor had to make several trips to Montgomery and Dothan, Alabama.

"After the work was completed by the Deputy Solicitor he was paid by the Court of County Commissioners the sum of \$350.00 to cover his expenses in the matter and to compensate him for his loss of time while out of his office in an effort to perform the work in this matter.

"Please advise me whether or not the above payment to the Deputy Solicitor was a legal expenditure of money."

In answer to your inquiry, I am of the opinion that the Deputy Solicitor in question cannot receive compensation for his services rendered the county under the contract, but may receive actual expenses incurred in connection therewith.

Section 5024, Code of 1923, as amended by Acts of 1936-37, p. 225, is as follows:

"Section 5024. COUNTY OFFICERS INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the County for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time for which, as such officer he is compensated on a per diem or fee basis, nor shall it be construed to prevent the Treasurer in lieu of a County deposi-

tory from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County. Approved March 2, 1937." (Italics supplied).

It will be seen from the above that said section prohibits the solicitor from accepting employment for work or services for the county. (See opinion of Attorney General to the Judge of Probate, Tuscaloosa County, December 29, 1937). The exemption provided in the last part of said section regarding the employment of an attorney to the county governing body applies only to an attorney who holds an office and as such officer he is compensated on a per diem or fee basis. The deputy solicitor of Bullock County is paid on a salary basis under the provisions of Section 5522, Code of Alabama, 1923. **Opinion of the Attorney General to the State Comptroller, November 9, 1937.**

From the above it follows that the deputy solicitor of Bullock County cannot make a contract with the county and therefore cannot receive compensation therefor. However, if the deputy solicitor rendered services for the county in his capacity as deputy solicitor and incurred expenses in connection therewith, in my opinion, he should be reimbursed to the extent of his expenditure for actual expenses.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 22, 1938

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Licenses—A doctor who has practiced for two years or more in another state must pay a license as provided by Schedule 106 of the 1935 Revenue Act before practicing in Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of January 11, 1938, in which you state:

"Please refer to Schedule 106 of the Revenue Code of 1935 and especially to the last sentence thereof.

"This sentence makes the provision that no license shall be required of doctors until they shall have practiced their profession for two years. I would like to have you tell me whether this means that such doctors shall have practiced their profession for more than two years in this

state before being liable for this license or if this two-year period is based on the time such doctor began to practice, regardless of the state in which he began.

"In order that I may make my point clearer, we have a doctor practicing in Escambia County who has been here less than two years, but who has practiced several years before in another state. This doctor has been cited to pay a license, and your official opinion is requested as to whether or not he is liable for such license under this statement of facts."

In my opinion, the doctor will have to pay the license as prescribed by Schedule 106 of the 1935 Revenue Act, as he has practiced his profession for two years. **Biennial Report of Attorney General, 1926-1928, p. 321.**

Schedule 106 provides as follows:

"**SCHEDULE 106.** Each person engaged in the practice of **MEDICINE, CHEMISTRY, BACTERIOLOGY, ROENTGENOLOGY**, or other similar profession, shall pay an annual license, in cities or towns of:

Over 5,000 inhabitants	\$25.00
1,000 to 5,000	10.00
All other places whether incorporated or not.....	5.00

but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license as above stated. Provided that the license imposed by this Schedule shall not apply until such person shall have practiced his or her profession as long as two years."

The wording of the exception is very plain and means that a beginner is given two years' grace before he has to pay any license. There is no qualification as to where the person shall have practiced his or her profession.

The old attorney's license schedule had a similar proviso in it and the same construction was placed on it by this office.

Opinion of this office to Hon. G. H. Howard, Judge of Probate, Wetumpka, Alabama, under date of July 22, 1931, Vol. 5, (Office Edition).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 24, 1938

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Gasoline Tax—Authority of county to anticipate gasoline tax and issue warrants against same includes the right to pay interest thereon.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of letter of McDowell and McDowell, Attorneys for the Barbour County Board of Revenue, which is as follows:

"Mindful of the law that gasoline funds received by the several Counties in Alabama from the State, may not be used for any purpose but that of roads; but also mindful of the law that Counties are permitted to anticipate receipts of gasoline funds from the State, and issue warrants therefor payable out of the gasoline receipts, we are directed by the Barbour County Board of Revenue to ask an opinion of the Attorney General as to whether or not in issuing warrants for anticipated revenues out of the gasoline funds, interest on the funds borrowed could be paid out of the gasoline receipts. We would naturally assume that it would be legal, but in the abundance of precaution we desire an opinion."

I am of the opinion that the inquiry in question should be answered in the affirmative.

This office has repeatedly ruled that a county may anticipate its receipts from the gasoline tax for certain road and bridge purposes, and issue warrants against same payable at a future date.—**Biennial Report of Attorney General, 1932-1934, page 407; Quarterly Report of Attorney General, Vol. V, pp. 32 and 38; Quarterly Report of Attorney General, Vol. VIII, p. 89.** See also *In re Opinions of the Justices*, 163 So. 105; *Herbert v. Perry et al.*, 2nd. Div. No. 107 (in MS.); *Lyon v. Shelby Co.*, 177 So. 306. The Herbert and Lyon cases and some of the opinions above cited use the words "interest bearing warrants" in dealing with this subject.

A county having the authority to contract may engage to pay interest on a warrant otherwise validly issued. Such comprehends the engagement for and the payment of interest as an incident to the principal obligation validly assumed.—*Littlejohn v. Littlejohn*, 195 Ala. 614, 71 So. 448; *Stone v. State*, 204 Ala. 13, 85 So. 443.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 25, 1938

Hon. Gordon Davis,
Circuit Solicitor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Lottery—Gaming—

Giving chances on prizes or premiums by merchants when consideration is directly or indirectly taken for said chances, is violative of Section 65 of the Constitution of Alabama of 1901 and Section 4247 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 27, 1937, in which you request a review by this office of the opinion rendered under date of December 3, 1935, to Hon. John K. Watkins, Solicitor, Fifth Judicial Circuit, Lee County, Opelika, Alabama. Your request is as follows:

"On or about December 3rd, 1935, your office rendered an opinion to Hon. John K. Watkins, Solicitor of the Fifth Judicial Circuit, Lee County, at Opelika, Alabama, concerning the operation of what is known as "Bank Night" in connection with the theater business. As you know, the above styled case is on appeal in the Supreme Court concerning the operation of "Bank Night" in connection with the theaters in Tuscaloosa. The Court of Appeals, as you are aware, has held that the bank night, as operated by the theaters in Tuscaloosa, is a lottery and the defendant has made application for rehearing, no doubt, with the view of taking the case to the Supreme Court.

"I, therefore, wish to request that the opinion rendered to Mr. Watkins be reviewed and revised and the conclusion reached in said opinion be corrected."

Upon more mature consideration, I am of the opinion that the scheme described in Solicitor Watkin's request for opinion is violative of Section 65 of the Constitution of 1901, and of Section 4247 of the Code of Alabama of 1923, in that it is a lottery or gift enterprise.

You will note that the Watkin's opinion is based on the assumption that "No consideration direct or indirect is given for the chance at one or more premiums as referred to" in the request for opinion.

Upon consideration, I am of the opinion that such an assumption was not warranted from the statement of facts, and I, therefore, reach the conclusion detailed above.

Section 65 of the Constitution of 1901 is as follows:

"Section 65. The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to pro-

hibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided."

Section 4247 of the Code of Alabama, 1923, states the legislative prohibition against lotteries as follows:

"Section 4247. Carrying on or representing lottery; selling tickets in same.—Any person who sets up, carries on, or is concerned in setting up or carrying on any lottery or device of like kind, or any gift enterprises, or any scheme in the nature of a lottery or gift enterprise or who sells or disposes of any lottery or gift enterprise ticket, or ticket in any scheme in the nature of a lottery or gift enterprise; or who shall receive money or take an order for any lottery or gift enterprise ticket, or any ticket in any scheme in the nature of a lottery or gift enterprise; or who is interested or concerned in selling or disposing of any ticket or gift enterprise; or who shall act for or represent any other person in selling or disposing of any such ticket, must, on the first conviction, be fined not less than twenty-five nor more than five hundred dollars; and, on the second conviction, must be fined not less than fifty nor more than five hundred dollars, and must also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than thirty nor more than ninety days; and on the third or any subsequent conviction, must be fined not less than one hundred nor more than one thousand dollars, and must also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than six nor more than twelve months."

Nor is the case of **Yellow-Stone-Kit v. State**, 88 Ala. 196, applicable to the facts detailed in Mr. Watkins' request. Beyond defining what constitutes a lottery, I cannot see that it has any bearing upon the question raised by said request. In the **Yellow-Stone-Kit** case, the "chances" dealt out were really and in truth free "chances." Under the facts detailed by Solicitor Watkins, it was necessary that a person purchase goods before he was entitled to a chance to participate in the drawing or lottery. This was sufficient consideration to constitute the plan a lottery and therefore make it in violation of Section 65 of the Constitution and Code Section 4247.

There are three elements necessary to constitute a lottery—one, a prize; two, a chance; and three, a consideration. Elements one and two readily appear to be present in the scheme or lottery which is operated by the parties mentioned in Solicitor Watkins' letter. The only doubt is whether or not the plan operated is void of consideration and therefore not a lottery.

In **Davenport v. City of Ottawa** (Kansas) 39 Pac. 708, it appears that a firm placed in its window a locked box containing \$25.00, and advertised that all persons buying goods in their store to the amount of fifty cents or more, would receive a key, and only one key would be given out which would unlock the box, and that the person receiving the key which would unlock the box, would be given the \$25.00. The accused sold goods to various persons at the usual and ordinary prices, without extra charge on account of the key, and gave to each of these persons a key, to which was attached a note stating the above offer. It was held that these transactions

were, in effect, sales of merchandise and lottery tickets for an aggregate price, and that the conviction of a member of the firm was proper under an ordinance prohibiting the sale and offering the sale of lottery tickets.

The facts in the Davenport case are on all fours with the facts detailed by Solicitor Watkins. Whether the customer be given a key or a ticket which entitles him to participate in a lottery, there is no difference. The principle is nevertheless the same. As stated in the Davenport case:

"In this instance, it may be conceded that the main purpose of the defendant was to increase his legitimate business by this scheme, and that the sale of merchandise was not used merely as a cover for conducting a lottery. The purpose of the defendant undoubtedly was to attract attention and stimulate trade at his store; but this case must be determined by the legal principles applicable to it. Suppose that instead of a large stock of general merchandise, on which only moderate profits were made, the defendant kept only such articles as usually bear a very high percentage of profit, and instead of offering \$25 had offered \$1,000, on precisely the same terms as this \$25 was offered, could any one doubt for a moment that those who are inclined to invest small sums for the purpose of gaining large ones would be likely to purchase articles for which they had no special need, merely with the hope of gaining the prize offered? Though the goods in such a case should be sold only at the regular retail price, the main business of the defendant would become that of selling chances to draw the \$1,000, rather than merchandise for a legitimate profit."

The case of *State v. Mumford*, 73 Mo. 647, is also directly in point. In that case it appears that the proprietors of a newspaper offered to each person who would subscribe at the usual subscription price for the paper during a given year, a ticket which entitled the holder to participate in a distribution of prizes. The distribution was made by lot. It was held that the scheme was a lottery within the purview and criminal laws and it made no difference that the tickets were not sold, but were given to subscribers and to no one else.

The court stated in its opinion that:

"The fact that the subscription price of the Times was not increased does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper."

Your attention is also directed to the following cases which are based on similar propositions of law:

Horner v. U. S. 147 U. S. 449, 13 Sup. Ct. 409, 37 L.Ed. 237;

State v. Shorts, 32 N. J. Law, 398, 90 Am. Dec. 668;

State v. Powell, (Minnesota) 212 N. W. 169.

In the *Powell* case, for each dollar's worth of merchandise purchased, the merchant gave purchaser a ticket entitling him to participate in a prize drawing. The Minnesota court held:

"The purchaser pays a consideration when he buys his merchandise. When he pays his dollar, he gets in return the merchandise and a chance to get a prize."

Moreover, in a recent case from the State of Georgia, **Gorman v. State**, 54 Ga. App. 738, the learned Court of Georgia quoted from **Myer v. State**, 112 Ga. 20, 57 S. E. 96, where it said:

"A merchant who gives to a designated class of customers an opportunity to secure by lot or chance any article of value additional to that for which such customers have paid, violates the provisions of the Penal Code which declares that no person 'shall keep, maintain, or employ or carry on any lottery in this State, or other scheme or device for the hazardry of any money or valuable things'."

The Appellate Court then makes the following statement:

"Mutuality of Risk is not necessary to constitute a lottery. The player or as in the present case, the purchaser of a ticket may get value received and the whole risk be assumed by the operator 'there must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances'."

The cases above cited are only a few of the numerous decisions of the courts of the various states of the Union which reached the conclusion that an operation, such as that mentioned in Solicitor Watkins' letter, is a lottery and violates the provisions of the lottery laws of the various states in question.

The Supreme Court of Alabama in the recent case of **Cecil Grimes v. State of Alabama**, 6th Div. 226 (MS) in passing on a question involving the legality of a "Bank Night" scheme tore through the chaff that has surrounded these schemes and schemes of a similar nature for so many years when it spoke as follows:

"The very fact that it is a business enterprise intended to swell the receipts from paid admissions to the theater, evidences an intention to garner a profit from the gift enterprise. For practical purposes the measure of the consideration moving to him is the excess of receipts from paid admissions on Bank Nights, over what they would have been for the entertainment in the absence of the Bank Night attraction. * * *

"It is not of consequence whether either the operator or the patron has figured just how much of the admission charge is paid for the chance. **"Gift enterprise" in the nature of a lottery, definitely covers a lottery in aid of legitimate business, through colorable gifts, but in fact prizes awarded by chance for a price.** * * *

"Theorize as one may, it remains, that looking through form and dealing with reality, the plan is intended to fill the theater, not the lobby outside. The more on the outside, the less the chance of those on the inside. To minimize the one and increase the other is part of the necessary intentment.

"The results, the success of the plan in swelling the patronage and consequent income through the scheme of chance, is the final proof of a consideration paid and a consideration received. * * * " (Emphasis supplied).

It appearing from the foregoing citations of authority that the Watkins opinion issued under date of December 3, 1935, is technically incorrect, the same is therefore withdrawn and this opinion substituted in its stead, my conclusion being that such an operation is in violation of Section 65 of the Constitution of Alabama of 1901 as well as Section 4247 of the Code of Alabama of 1923, both of which I have quoted, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 2, 1938.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

License—Schedule 146, Section 348, Article 13, Chapter 1, Revenue Act of 1935, page 256, as amended by Act No. 230, Acts of 1936-37, page 277.

Operator of rolling store who sells tobacco products is subject to the highest license provided by Schedule 32, Revenue Act of Alabama of 1935, page 451.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry of recent date as follows:

"Some persons in Conecuh County are selling tobacco, cigarettes and etc., on rolling stores. Citations have been issued against some of these for selling these articles. The State Tax Commission rules that persons operating rolling stores and who sells tobacco products therefrom are liable for a privilege license for making such sales.

"Will you please advise as follows: Under Bill Number 230, House Bill 180 by McDermott, Acts of the extra session of Legislature of 1936-1937, schedule 146, page 288 Simon's Code, is a person who has purchased a privilege license to operate a rolling store and who handles on said rolling store, tobacco, cigarettes and etc., liable for a privilege license for handling such tobacco products.

"Inasmuch as citations have been issued and are here in the Probate Office, will you please advise me at the very earliest possible date."

It is my opinion that the operator of a rolling store who sells tobacco products as outlined in the aforementioned inquiry is subject to the highest license which is imposed by Schedule 32, Revenue Act of 1935, page 451.

This office in an opinion dated December 3, 1935, to Hon. Frank M. Johnson, Judge of Probate, Winston County, Double Springs, Alabama, reported in Quarterly Reports of the Attorney General, Vol. I, page 279, held that there was no authority to issue a license to a rolling store to sell tobacco products. This opinion further held that such products are required to be sold at fixed locations. I quote from said opinion as follows:

"It is clear, I think, that proviso contemplates the issuance of a license for a fixed place of business. A rolling store necessarily has no fixed place of business and a license would, therefore, not be issuable to authorize it to sell one of the products for which a special license is required and which is required to be sold at a fixed location."

The opinion to Mr. Johnson was rendered before Schedule 146 of Section 348 of Article 13, Chapter 1, of the Revenue Act of 1935 was amended by the legislature according to the terms of Act No. 230, General Acts of 1936-37, page 277, by addition thereto of the following as underscored:

"The payment of the privilege license required by this Schedule shall not authorize any transient vendor or peddler to sell any goods, wares, or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied, or to sell any goods, wares, or merchandise that are by law required to be sold at a fixed location, except upon the payment of the maximum license levied under the Schedule or Schedules of this chapter for the sale of merchandise at a fixed location."

The highest license required to be paid pursuant to the terms of the Schedule 32, supra, for the sale of the tobacco products mentioned in your letter is \$15.00, State license, plus county license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 2, 1938.

Hon. William G. Lindsey,
County Solicitor,
Washington County,
Chatom, Alabama.

Elections—Authority to establish district and precincts.

County governing body may not subdivide into election districts an election precinct which contains less than 300 legally qualified voters.

In the event election precincts were established by local law prior to the ordination of the Constitution of 1901, only the Legislature can change the same.

In the event election districts have been established under the general provisions of law, the county governing body may divide into two precincts any one which contains more than 500 legally qualified voters; or may subdivide the same into election districts.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. In Precinct 11, of this County, there are approximately 225 votes. This precinct already has two voting Boxes. Can the court of County Commissioners of this County, add an additional or third box in this precinct, as a matter of convenience to the voters in part of this Precinct?

"If you answer the above in the affirmative, what procedure would the Court of County Commissioners have to take?

"2. Can the Court of County Commissioners, legally create or add an additional Precinct, to the number of Precincts already existing or created in the County?

"If you answer this in the affirmative, what steps or procedure would the Court have to take in creating this new and additional Precinct?"

Your first question must be answered in the negative. Section 427 of the Code of 1923 provides for the division of election precincts into election districts, and the establishment of separate voting places therein only in the event that there are, at the time of the action of the county governing body effecting said division, more than 300 legal voters in said election precinct.

Your second question must be answered conditionally. In the event that existing election precincts in Washington County were fixed by local law prior to the ordination of the Constitution of 1901, the only authority which may effect a change in the said precincts is the Legislature itself. *Schulte v. Wilke*, 167 Ala. 664.

In the event, however, that the election precincts have been established under the general provisions of law, as contra-distinguished from the provisions of local acts, Section 425 of the Code of 1923 is applicable; and the county governing body may, in the event the now existing precinct contains more than 500 legal voters, divide the same into two precincts, or may subdivide the same into election districts.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 4, 1938.

Hon. H. E. Williams, Superintendent,
Board of Education,
Lauderdale County,
Florence, Alabama.

County Boards of Education are without authority to make appropriations out of educational funds for salaries of County Farm Demonstration Agents and Home Demonstration Agents.

Opinion by Assistant Attorney General King.

Dear Sir:

I have your request for opinion as follows:

"The Lauderdale County Board of Education has been paying \$58.00 per month on the county agent's salary and \$40.00 per month on the home demonstration agent's salary for a number of years. I know that there has been a ruling from the Attorney General's office to the effect that such payments were legal and it was customary to pay such appropriations from the bonus fund.

"Under the new minimum school program it is my understanding a number of funds have been merged and that there is no special bonus fund as was provided under the old law. The state auditors who have recently audited the records of my office seem to have some doubt as to whether or not it is legal for the board of education to pay county agents under the present minimum education program law. Please advise me whether or not such payments are legal under the present minimum program law?

"I know that the present minimum program law does not specifically provide for such appropriations and it seems to me that such agencies should be provided for out of other funds without using our educational funds which are already totally inadequate for our present educational program. I doubt that our board will continue such appropriations even if legal, however, I am anxious to have your opinion on this question under the present law."

In my opinion your question should be answered in the negative.

I know of no provision of law which authorizes County Boards of Education to make appropriations out of the Minimum Program Fund for salaries of County Farm Demonstration Agents or Home Demonstration Agents.

Sections 1 and 2 of Act No. 295, approved September 2, 1935, (General Acts 1935, page 714) set forth the uses to which such Minimum Program Fund may be employed, which uses do not include the subject of your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 5, 1938.

Board of Revenue,
Sumter County,
Livingston, Alabama.

Counties—Under facts set out Sumter County is not authorized to borrow surplus from sinking fund, which is for specific purpose of retiring refunded Road and Bridge Bonds, to construct county office building and issue interest bearing general fund warrants to sinking fund all of which will be repaid before maturity date of bonds.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of letters of December 30, 1937, and January 20, 1938, signed by T. V. White, Clerk, Board of Revenue, which are in substance as follows:

"The Board of Revenue of Sumter County, Alabama, requests your early opinion on the following matter:

"The following is a resolution regularly passed by the Board of Revenue:

"Whereas the present Sumter County Courthouse is highly inadequate to house the officials to whom the Board of Revenue is required by law to furnish office space, and whereas it is very expensive, inconvenient if not practically impossible to rent the necessary office space, and whereas the Board of Revenue finds that there is an accumulated surplus of the road and bridge fund over and above the amount necessary to meet the annual interest and maturing installments on the principal of the road and bridge bonds, and whereas the Board of Revenue finds that it is practically impossible to satisfactorily invest said funds in outside securities or in the bank on interest, and whereas the Board of Revenue further finds that the annual rent saved the County would over a practical period of years pay for a building sufficient to meet the County's needs, and whereas the Board of Revenue further finds that the receipts of the general fund of the County would be more than ample over and above the regular budget to retire any loan made for said building purpose together with interest thereon before the year 1955 when the last maturing road and bridge bonds become due;

"Therefore Be It Resolved By the Board of Revenue of Sumter County, Alabama, That an office building sufficient to meet the needs of the County be erected on the Courthouse square in Livingston, Alabama; and that the General Fund of the County for the purpose of financing the same borrow from the surplus in the road and bridge fund the sum sufficient and issue therefor interest bearing securities; And Be It Further Resolved That E. H. Longshore president of the Board and T. V. White Clerk of the Board be appointed as a building committee to work out the details and have general supervision of the matters herein mentioned.

"The above resolution will give you most of the facts involved. The details of the pay back of the loan have not been entirely settled but

the entire loan would be repaid before 1955 when the last maturing road and bridge bonds mature. When the road and bridge bonds were floated the road and bridge tax were specifically pledged to retire the bonds but said bonds were issued under the Municipal Bond Code which requires the sinking fund to be invested on interest or placed in the Bank on interest.

"The Board wishes your opinion as to whether in accordance with the above resolution it would be legal for the General Fund to borrow from the sinking fund of the Road and Bridge Fund any surplus accumulated over and above the amount necessary to meet the annual interest and maturity installments of the Road and Bridge Bonds, for the purpose declared in the resolution, and have the General Fund issue to the Road and Bridge Fund its interest bearing warrants all of which are to be repaid before the last Road and Bridge Bonds mature.

"When the Sumter County Road and Bridge Bonds were refunded under the Municipal Bond Code of 1927 the Road and Bridge Tax were pledged for the retirement of the Bonds. This tax each year goes into the sinking fund for the retirement of the Bonds, but the fund is accumulating a surplus over and above the amount necessary to care for each years installment of principal and interest. This surplus fund is not lent to any Bank on interest or invested in any of the securities provided for in the Bond Code relating to investment of Sinking Funds. The Resolution sent you provides for the General Fund borrowing this surplus in the Sinking Fund and issuing interest bearing Warrants for it all of which are to be repaid before the last Road and Bridge Refunding Bonds mature, the borrowed money to be used to erect the Court house addition. The Board wishes to know whether in the light of the pledge of the funds and the provisions of the Bond Code of 1927 for investment of sinking funds, the method of financing and the use of the funds as set out in the Resolution, the Resolution can be legally carried out."

I am of the opinion your inquiry should be answered in the negative.

From the facts set out above, it appears that the bonds in question were issued for the specific purpose of refunding certain outstanding Road and Bridge Bonds of Sumter County under the provisions of the Municipal Bond Code of 1927. The road and bridge tax was pledged for the retirement of the bonds and each year said tax goes into a sinking fund for this specific purpose.

Sinking funds, under the provisions of the Municipal Bond Code, can be invested only according to the provisions of Section 2294(61) Michie's Code of 1923, as amended by Acts 1935, p. 581. This office has ruled that the sinking funds providing for the retirement of bonds must be invested in bonds of the United States of America or in bonds of the State of Alabama or bonds of any county of the State of Alabama or any municipal corporation of the State of Alabama or deposited in bank on interest.—**Opinion of Attorney General to Judge of Probate of Randolph County on September 16, 1935.** We have also ruled that counties are not authorized to use cash balance in bond sinking fund accounts to pay current claims, reimbursing the sinking fund thereafter by payments from the general fund of amounts equal to the installments which would have matured on such current claims.—**Opinion of Attorney General to the President of the Board of Revenue,**

Shelby County, July 8, 1935. From the foregoing, it appears that the investment of county sinking funds for the retirement of bonds is limited. And this is specifically true in the instant case, as the tax in question is pledged for the specific purpose of retiring the bonds in question.

This opinion is not in conflict with the one rendered to the Board of Revenue of Barbour County on July 18, 1936, (Quarterly Report of Attorney General, Vol. 3, p. 172), as in that opinion the particular facts authorized temporary loans from surplus funds collected to retire bonds to meet necessary current governmental expenses. There was a surplus each year in the sinking fund as the bonds were retired regularly. In other words, there was a sufficient amount each year to meet the retirement of the bonds according to the schedule set out in said opinion. This opinion is not in conflict with an opinion rendered to the Judge of Probate of DeKalb County on August 16, 1934 (Biennial Report of Attorney General, 1932-34, p. 621), as the sinking fund referred to in that opinion is the one provided for by sub-section 22 of Section 6755, Code of Alabama, 1923, as amended by Acts 1931, p. 759.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1938.

Hon. F. B. Thompson,
Judge of Probate,
Clay County,
Ashland, Alabama.

Taxation—Motor Vehicle Licenses—

Under the provisions of Acts, Extra Session 1936-37, p. 108, amending Schedule 158.5 of the Revenue Act, 1935, the applicant for motor vehicle license tag who owns motor vehicle since the beginning of the current tax year, but who used and operated the same wholly without the State of Alabama until after November 15 of said tax year is entitled to the monthly declining rate provided therein.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Your opinion is requested in the following case. Mr. Walker Steed of this county purchased a motor truck in January 1937 and purchased a tag for same in this county and operated said truck in this state until some time in September—not later than September 30, 1937—at which time he went to Mississippi and he has used said truck in Mississippi under a Mississippi tag, purchased in that state after he went there. He now returns to this county in January, 1938, and wishes to buy a tag

for this truck under terms of an act to amend Sec. 158 of Chapter 6, Article 13 of an act entitled 'An Act to provide for the general revenue of the State of Alabama', approved July 10, 1935, found on page 108 of the General and Local Acts of Alabama, Extra Session 1936-37. May I issue a license tag for his truck at the monthly declining rate?"

In my opinion, under the facts stated a motor vehicle license tag may be issued to the applicant therefor upon the payment of the license therefor arrived at by application of the monthly declining rate as is provided for by Acts, Extra Session, 1936-37, p. 108, which amends Section 158.5 of the Revenue Act, 1935. After levying the tax, it is provided:

"Provided, however, except for trucks purchased prior to November 15th of any tax year that the licenses called for under this schedule shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year, and that the purchaser shall only buy a license for the then remaining months of the tax year. * * * "

Under the facts stated in your inquiry the motor vehicle was not "**purchased**" prior to November 15th of the tax year for which the application is made for the motor vehicle tag. Of course, the current tax year begins October first. The statutes provide a grace period within which an applicant may procure a motor vehicle license tag without the payment of penalty or citation fee. It would be manifestly inequitable in view of this grace period to allow an applicant who has operated a motor vehicle during the grace period the benefit of the monthly declining rate. However, it would be just as inequitable to require an owner of a vehicle during all of the tax year, who had not used the same on the roadway in violation of the motor vehicle laws of the State to procure a license for the entire tax year and to deny to him the benefits of the monthly declining rate. Such was not the legislative intention.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1938.

Hon. Henry S. Long,
State Tax Commission,
Capitol.

Taxation—Store License—Optometrist—Revenue Act No. 256—
Schedule 155, page 505.

Optometrist who has paid license to practice optometry is liable for store license if he sells eyeglass frames in connection with his professional services.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry which I quote as follows:

"Are optometrists, who sell eyeglass frames exclusively to clients in connection with professional services rendered, subject to the payment of a store license under Schedule 155, Revenue Act of 1935?"

It is my opinion that an optometrist who has paid a license to practice his profession is liable for store license if in connection with such professional services he sells eyeglass frames to his patients.

Revenue Act No. 256, Schedule 155, General Acts of Alabama, page 505, provides that:

"From and after the first day of January, 1936, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the State Tax Commission, as hereinafter provided."

A store has been defined as follows:

"'Store' is defined by Webster as any place where goods are sold, either by wholesale or retail. *Salamon v. Pioneer Cooperative Co.*, 21 Fla. 374, 385, 58 American Rep. 667; *Martin v. City of Portland*, 17 Atl. 72, 73, 81 Maine 293; *Petty v. State*, 22 S. W. 654, 655, 58 Ark. 1; *Sparrenberger v. State*, 53 Ala. 481, 483, 25 Am. Rep. 643."

The Supreme Court of Alabama, speaking through Justice Thomas, in the case of **State Tax Commission of Alabama v. T. D. Hopkins**, reported in 176 So. 210, speaking to the contention of the appellee that he was not liable for the payment of Sales Tax levied by the Alabama Sales Tax Act, because he was selling service and not tangible articles, the agreed statement of facts being that the value of the material employed in the manufacture of glasses for and fitting the same to the customer was about twenty per cent of the total price charged for the manufacture and service when the glasses were completed and delivered, held as follows:

"The test as to the application and validity of the tax in such cases is not the relative value of the material and service, but the nature and character of the process, activities or manufacture required or employed. That the manner is severable, as indicated by the agreed case, does not change the fact or process of manufacture and sale of a tangible personal property made the subject of appropriate provisions of the statute. *Lone Star Cement Co. et al., v. State Tax Commission, et al.* (3rd Div. 222) MS." (Emphasis supplied).

(Note: The optometrist contended that the transaction was all services and the material incidental).

Under the foregoing decision, the Supreme Court has held that the delivery of the eyeglasses, along with the frames, constituted a delivery and/or sale of tangible articles of merchandise. Therefore, an optometrist who sells frames in connection with his professional services is operating a store.

It is common knowledge that many oculists prescribe glasses but do not sell or deliver the lenses or frames in connection with said prescription.

Such transactions constitute service, but where a sale of frames and lenses is made by an optometrist in connection with his prescription, it is my opinion that such sale is not altogether service, but constitutes a sale of tangible articles. **State Tax Commission v. Hopkins, supra.**

It is true that Section 2873 of the Code of Alabama, 1923, defines optometry as follows:

"Optometry defined.—The practice of optometry is defined to be the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its functional powers and adopting mechanical means for the aid thereof."

An optometrist may measure the functional powers of the eye and adopt mechanical means for the aid thereof, but such adoption does not necessarily mean that he may sell such mechanical means without the payment of a store license. In the sense as used in the aforequoted statute, the Legislature probably was referring to a prescription for mechanical means of aiding the eyes and not the actual sale of the merchandise which is to be employed as the mechanical means of aid.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 9, 1938.

Dr. Daniel T. McCall, President,
Mobile County Revenue and Road Commissioners,
Mobile, Alabama.

Counties—Have authority to furnish sheriff with machine guns, gas guns and ammunition in connection with the performance of duties of said office.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 23, 1937, which is as follows:

"Please furnish me with your opinion on the following:

"1. Can the Board of Revenue and Road Commissioners of Mobile County, Alabama, furnish the Sheriff with machine guns, gas guns and ammunition?

"The Sheriff of this county is on a fee basis and therefore I can't feel that the county can legally furnish him with the above."

I am of the opinion that your inquiry should be answered in the affirmative provided said machine guns, gas guns and ammunition are used in the performance of the official duties of the sheriff's office.

Under Section 5135 of the Code of 1923, the sheriff is the principal conservator of the peace in the county and it is his duty to suppress all riots, unlawful assemblies and affrays.

The duties of the sheriff are set out in Section 10189, Code of Alabama, 1923. Subsection 4 of said section provides as follows:

"Section 10189. DUTIES OF SHERIFF.—It is the duty of the sheriff—

* * * *

(4) It shall be the duty of sheriffs in their respective counties by themselves or deputies to ferret out crime, to apprehend and arrest criminals, and in so far as within their power to secure evidence of crimes in their counties, and to present a report of the evidence so secured to the solicitor or deputy solicitor of the county, or if there is an inferior or special statutory court within the county in which a solicitor prosecutes criminal cases, then to such solicitor."

Also under Sections 10190 and 10191 certain investigations are authorized and the expenses of same are paid by the county.

From the above, it appears that certain duties are imposed upon the sheriff in connection with the enforcement of the criminal laws of the State of Alabama.

Since these duties are imposed upon the sheriff, it follows that the county would be authorized to make reasonable expenditures in connection therewith. In other words, such expenditures, although not directly authorized, would be proper by necessary implication.—*Ensley Motor Car Co. v. O'Rear, Treasurer*, 196 Ala. 481, 71 So. 702; *Bice v. Foshee*, 19 Ala. 421, 97 So. 764. In the enforcement of such duties the use of machine guns, gas guns and ammunition would properly and probably be essential in some instances and, in my judgment, the county governing body is authorized to furnish the sheriff with same. This is particularly true in this modern day of gangsters and organized crime.

This holding is in line with an opinion rendered to the Solicitor of the Eleventh Judicial Circuit, Florence, Alabama, on July 31, 1933, (Biennial Report of Attorney General, 1932-1934, p. 324), wherein it was held that the county can legally pay for the chemical analysis of alleged prohibited liquors under Section 10190 and 10191 of the Code of Alabama, 1923.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 10, 1938.

Hon. T. C. Garner,
County Treasurer,
Jefferson County,
Birmingham, Alabama.
Counties—

(1) It is the duty of county governing body to prepare budget. Treasurer may prepare supplemental budget in accordance therewith, setting up proposed appropriations and the order of priority for payment.

(2) Claims set out in Section 231, Code of 1923, as subsequently amended, are preferred. Other involuntary obligations of county are then payable, and lastly voluntary obligations are paid. Claims of same special class are payable pro rata if funds are insufficient to meet payment in full.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 4, 1938, which is as follows:

"Act approved June 6, 1935 Page 162, Acts of 1935, amending Section 231 of the Code of 1923 sets up preferred claims and other order of the priority for Jefferson County. The last sentence of said act was as follows to wit:

"For the payment of the above recited claims, in the order named, it shall be the duty of the County Treasurer or custodian of the County funds to set apart a sufficient fund from the moneys of the County and he and his official bond shall be held liable for a failure so to do, insofar as the funds of the County made it possible for him so to do."

"Please advise me on the following questions:

"(1) To carry out the provisions of this act, is it the duty of the County Treasurer to prepare a budget showing the amount of estimated receipts and disbursements?

"(2) Preparing the budget, should the County Treasurer set up the claims mentioned in said act as preferred claims?

"(3) If there is insufficient funds to pay the preferred claims, should the County Treasurer prorate the amount of revenue so that each claim could share alike in the disbursements?

"(4) If there is sufficient funds to pay the preferred claims in full, and the balance remaining is insufficient to pay other claims, should said balance be prorated equally among the other claims?"

Before specifically answering your inquiries, wish to state that Section 231 of the Code of 1923 has been twice amended. The first amendment was

by General Acts 1935, p. 162. General Acts 1935, p. 990, amended Section 3 of said Code section as amended by General Acts 1935, p. 162.

In answer to your first inquiry, it is my opinion that the duty of adopting a budget system for conduct of the affairs of a county rests on the county governing body.—**Section 6789, Code of 1923; Rhodes v. Marengo County Bank**, 205 Ala. 667, 88 So. 850; **Quarterly Report of Attorney General**, Vol. 1, p. 56. The County Financial Control Act (General Acts 1935, p. 803) has no application to Jefferson County. However, the Uniform System of Accounting and Reporting of County Offices Act (General Acts 1935, p. 43) is applicable to all counties of this State. Under Section 6789, supra, Jefferson County governing body is required to adopt a budget system for the county.

After the budget has been adopted by the county governing body, the County Treasurer may prepare a supplemental budget in accordance therewith. The estimated disbursements are already set up. He should set up a list of the estimated receipts for comparison.

I am of the opinion that your second inquiry should be answered in the affirmative. Section 231 of the Code of 1923, as subsequently amended, sets out certain preferred claims of the involuntary class, and must be paid first in order of their priority. It is necessary to set up the claims mentioned in said section as subsequently amended, in order that these classes of claims may be properly paid in the order of their priority.

Your third and fourth inquiries will be answered together for convenience.

Legitimate county debts or obligations are of two general classes; namely, (1) those which are prescribed and imposed by law and are purely involuntary as to a county, and (2) those which are merely authorized by law, and may be assumed by the county when the condition of the county treasury will admit of it.—**Quarterly Report of Attorney General**, Vol. I, p. 56, supra, **Biennial Report of Attorney General**, 1930-1932, p. 1057. See also **Brown v. Gay-Padgett Hdw. Co.**, 188 Ala. 423, 66 So. 161.

The claims set up in Section 231 of the Code of 1923, as subsequently amended, are claims of the first general class, as above defined. It is a division of claims of the first general class as to the order of priority of payment of claims of that class. It is not all inclusive as there may be other claims of the first general class than those therein enumerated.

Claims of the type set out in Section 231, supra, as amended, are payable in the order of the priority therein set out. The claims of subdivision 1 of said section, as amended, should be paid in full before payments are made of claims of subdivision 2. The claims of subdivision 2 are made before claims of subdivision 3, and so on. All claims of each separate subdivision are proratable accordingly. If there are insufficient funds to pay all preferred claims under Section 231, as amended, payment should be made in this manner.

After the preferred claims set up in Section 231, as amended, have been met, the next order of priority are those other claims of the general class 1 (involuntary obligations) as above defined. These claims are proratable if there are not sufficient funds to meet them in full.

If all claims of the general class 1 (involuntary obligations) are paid, then the claims of general class 2 (voluntary obligations) as above defined, can be paid. If there are not sufficient funds to pay all of these involuntary obligations, then they are paid pro rata.

It is impossible to set up a budget that will be workable to the nth degree. Certain obligations arise that cannot be foreseen. The anticipated revenues may either be more or less than anticipated. Therefore, the budget adopted necessarily is elastic and may be amended from time to time by the county governing body to meet existing conditions when absolutely necessary.—**Quarterly Report of Attorney General**, Vol. VIII, p. 111; **Quarterly Report of Attorney General**, Vol. VII, p. 199.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 14, 1938.

Hon. S. M. Cobb,
Clerk of the Circuit Court,
Wilcox County,
Camden, Alabama.

1. Where a suit is brought for a minor by a next friend, such next friend is responsible for the costs, where the plaintiff fails in suit.

2. Execution cannot be issued against a minor.

3. Execution may be issued against a non-resident to be levied on property within this State. Where non-resident has no property in this State, then suit must be brought against the non-resident on the judgment of this State, in the State of his residence.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Please give me an opinion to the following questions:

1. When a suit is filed by a plaintiff, as next friend of a minor, is the party plaintiff (next friend) responsible for the cost when the plaintiff fails in the suit?

2. Can I issue execution against a minor.

3. Can I issue execution against a non-resident?"

My answer to your first request is in the affirmative. **Hughes v. Hughes**, 44, Ala. 698; **Smith v. Gaffard**, 33 Ala. 168. These cases are old but they

seem to have settled the law on this question, as they, so far as I can ascertain, have not been disturbed. The Supreme Court of Alabama seems to have confirmed the holding in the above cases in the case of *ex parte Bennett*, 231 Ala. 223.

As to your second request our answer is in the negative, as an infant cannot bring suit in his own name, unless his disabilities have been removed, but may bring suit by next friend, and on the cases cited above, the next friend is liable for costs.

My answer to your third request is in the affirmative; that is, if the non-resident has property in the State subject to execution, otherwise suit on judgment obtained here in Alabama would have to be brought against the defendant in the State of his residence and judgment there obtained.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 15, 1938.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—Invalid Assessments—Redemptions from invalid assessments—

1. Assessment of real property to the estate of the deceased owner is void.
2. Assessment of real property, title to which is vested in certain designated beneficiaries of a will, is void if made in the name of and to an executor who has not intercepted said property for payment of debts lawfully claimed against the estate of testator.
3. Real property that has been sold for payment of taxes is not the subject of redemption if the assessment and sale thereof were void.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"I wrote you on December 31st, 1937 relative to Judge Joseph N. McAleer, as Attorney for Miss Margaret E. Finch and Mrs. Emma C. Harris, calling on me on that date desiring to redeem from the tax sale in 1933 for the taxes of 1932 certain property assessed to 'Estate of R. A. Finch' and another assessment against 'Estate of R. A. Finch and Lewis W. Harris'. Miss Margaret E. Finch is the owner of all real property assessed in 'Estate of R. A. Finch' and Mrs. Emma C. Harris is the owner of only one-half of the interest in the assessment to the 'Estate

of R. A. Finch and Lewis W. Harris'. I desire to withdraw my letter of December 31st, 1937 and my supplemental letter of January 28th, 1938, and to re-state to you the condition of all sales of property belonging to R. A. Finch and property jointly owned by R. A. Finch and Lewis W. Harris, both deceased many years ago. At the time I wrote you my attention was not called to the second sale of the respective properties.

"I have checked the records and find that there was a sale of each one of the above assessments in 1933 for the 1932 tax assessment as above set out, which sale was had under a decree of sale by the former Judge of Probate, Price Williams, now deceased, and that the notice of sale was regularly advertised and same were bid in by the State, as set out in the Tax Sales Book for the year 1932, but the description of the property and the amount of the taxes, costs of sale, etc. in the Tax Sales Book has an ink line run through the same. The Assessment Book for 1932 containing the above two assessments is marked with a stamp in red ink 'Sold for 1932 taxes' and the word 'Error' in lead-pencil is marked over the same.

"There is also a tax sale in 1936 of both of the above described properties, one of the assessments reading 'Gregory B. Finch Exct. for Estate R. A. Finch' and the other 'Gregory B. Finch Exct. for Estate R. A. Finch & Lewis M. Harris', which was an assessment made as an Escape for the years 1932-33-34 and '35, and sold in 1936.

"Judge McAleer offered to redeem all of the properties under the sale of 1932 in order to save the penalties and interest thereon under the Act of the Legislature. He stated that Mr. Touart, the Tax Assessor, had agreed on what was the fair assessed value of the property for the years 1933-34-35-36 and '37, and that Mr. Touart had written to Mr. Henry Long giving him this information and stating that in his opinion the assessment was excessive. Judge McAleer stated that at the time he had Mr. Touart write this letter to Mr. Long he knew nothing of the sale of 1932, and upon discovering this he took the matter up with Mr. Curry and Mr. Carleton, both in the State Tax Commission Office, and they had informed him that no redemption could be made under the 1932 tax sale. I stated to him that I had some doubt as to whether or not he could redeem this property under the tax sale of 1932, but that I would write the Attorney General for an opinion on this matter.

"The will of Lewis W. Harris was admitted to probate on September 10th, 1914, in which—after giving certain bequests in money—he gave the residue to his wife, Emma Carley Harris. (Will Book 10, page 45). Letters testamentary were issued to Richard A. Finch as Executor in accordance with the last will and testament.

"The will of Richard A. Finch was admitted to probate on December 7th, 1923, and letters testamentary were issued in accordance with said will to Gregory B. Finch on the same date. (Will Book 12, page 210). In the will of Richard A. Finch he gave his entire estate, share and share alike, to his seven children. Petition was filed by Gregory B. Finch for the probate of his father's will, in which petition he set out that his father was a widower at the time of his death and left seven children, namely: Gregory B. Finch, Cecilia M. Finch, Margaret E. Finch, Richard A. Finch, John T. Finch, Mary A. Finch and Albert F. Finch.

"There was a proceeding filed for the sale of the real property of Richard A. Finch, dec. for division and payment of liens, the petition being filed by Gregory B. Finch individually and as Executor Estate R. A. Finch, deceased, and Richard A. Finch, against Cecilia M. Finch and Margaret E. Finch, Mary A. Finch, Albert F. Finch, and Estelle M. Finch, widow of John T. Finch, and his seven minor children namely:—John T. Finch, Jr., Mary Ann Finch, Estelle Finch, Elsie Finch, Richard A. Finch, Elizabeth Finch and Frances Finch, setting out in the petition that Gregory B. Finch, Cecilia M. Finch, Margaret E. Finch, Richard A. Finch, Mary A. Finch and Albert E. Finch each owned an undivided one-seventh interest in the real property and that the seven minors, subject to the dower of their mother, Estelle M. Finch, each own an undivided one-forty ninth interest therein; and the petition prays for the sale of the property for division and the payment of lien claims. Subsequently the petition was amended so as to pray for a sale for division, subject to liens, and decree confirming the sale of the real property to the purchaser, Margaret E. Finch, was rendered on November 25th, 1936, and conveyance was made to her by the Commissioner and was filed for record on April 15th, 1936, and recorded in Deed Book 265 N. S., p. 170.

"I would respectfully request that you give me an opinion as to whether or not the purchaser has a right to redeem under either of said tax sales, and if so under which one.

"I am giving this letter to Judge McAleer, at his request, in order that he may enclose the same with a letter that he is going to write you on the subject."

Also, reference is made to the letter of Mr. H. M. Touart, Tax Assessor, Mobile County, Alabama, giving additional facts, and which are to be considered in connection with your inquiry, as follows:

"At the request of Judge Joseph N. McAleer I am writing you relative to the assessment of real property formerly belonging to Richard A. Finch and jointly to Richard A. Finch and Lewis W. Harris.

"There was an assessment made for the year 1932 as follows: 'Estate of R. A. Finch', and the other assessment to 'Estate of R. A. Finch and Lewis W. Harris'.

"There was a decree of sale under these two assessments, and advertisement, and a sale to the State, and in this Tax-Sales Book for sales of 1932 both of these sales are marked out in ink with an X.

"There was another assessment made in 1935 against these respective properties as follows:

"'Gregory B. Finch Exct. for Estate of R. A. Finch,' and the other assessment to

"'Gregory B. Finch Exct. for Estate R. A. Finch & Lewis W. Harris', as an Escape for the years 1932-33-34 and '35, and regularly advertised and sold under the assessments and bid in by the State.

"I am turning this letter over to Judge McAleer to mail to you, at his request, as he states to me that he is writing you a letter relative to this matter and desires both letters to reach you at the same time."

The assessment of and for the 1932 taxes as outlined in the aforequoted letters was void and does not support a valid sale of the assessed property for the payment of taxes.

The Supreme Court of Alabama has several times held that an assessment of property to the estate of a deceased owner is without lawful attributes. A recent case is that of **Henderson v. Simmons**, 174 So. 491, in which the Court, speaking through Justice Knight, said as follows:

"A valid assessment of the property is indispensable to give the probate court jurisdiction to declare a lien and decree a sale for the unpaid taxes. Lands cannot be assessed for taxation as the property of a deceased owner, or of his estate, and a sale founded on such an assessment is void, a mere nullity, and a purchaser at such a sale acquires no title. **Jackson v. King**, 82 Ala. 43, 3 So. 232; **Scott v. Brown** 106 Ala. 604, 17 So. 731."

In determining the validity of the second assessment for 1932-33-34 and 1935 taxes, I deem it advisable to make brief reference to certain facts which I conclude from the above letters to be as follows: The Tax Assessor assessed the property, the subject of your inquiry, in the representative name of and to the executor, who had never intercepted the land for the payment of debts, although he did join with other complainants in a bill to sell the property for division among the joint owners, subject, however, to certain liens thereon. The property was willed to certain designated beneficiaries.

Section 31, Revenue Act of Alabama, 1935, makes it "the duty of every person in every election precinct * * * to render to the assessor under oath a full and complete list of all property of which he was the owner, or in which he had any interest whatever, or of which he was the trustee or agent, on the first day of October of that year."

Justice Somerville, speaking for the Supreme Court of Alabama in the case of **State v. White Furniture Company**, 206 Ala. 575, after referring to Section 44, Revenue Act of 1919, quoting therefrom identically as in the preceding paragraph, said as follows:

"So, when a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use or enjoyment of the property as such."

An executor of a will that vests title to real property in certain named persons or beneficiaries is not the owner of the real property, and in the absence of interception for payment of debts, as he is lawfully authorized to do when the personal property is insufficient therefor (**Golding v. Golding**, 24 Ala. 122; **Stovall v. Clay**, 20 So. 387), has no general or beneficial interest in such property.

Subject to payment of debts, and to the rights of the widow and/or minor children, the real property of a person dying intestate descends to the heirs who take title thereto. I quote the Supreme Court of Alabama,

Randolph v. Vail, 180 Ala. 85, Justice de Graffenreid, speaking for the court as follows:

"While our statutes confer large powers upon the administrator of an estate over the real estate of the intestate, the legal title to such lands descends to the heirs of such intestate. It is their land, subject, of course, to the payment of the debts of the intestate if the personalty proves insufficient for that purpose, and subject to certain powers which our statutes confer upon the administrator while acting as such administrator. He may rent out such lands; and if he does so he, in the performance of that act, is a trustee, and is chargeable as such trustee. He may, for certain purposes, under the orders of a court of competent jurisdiction, sell the lands; and if he does so, then in the performance of that act, he is a trustee, and is chargeable as such. For this reason it has been many times held that the purchase by an administrator at his own sale of the lands of his intestate is voidable at the option of the cestui que trust, and will be set aside by a court of equity if application for that purpose is made within a reasonable time.—James v. James, 55 Ala. 525."

There is a parallel of title in one who takes absolutely through a will and in one who inherits the fee from a person dying intestate. In either case, an administrator or executor has the lawful right to intercept the real property for payment of debts.

The mere existence of liens on the real property of the estate does not give the executor or administrator a lawful right to intercept such property. The debt which the lien secures may not be a lawful charge against the estate because it is barred by the statute of limitations or not properly filed in the manner and within the time required by law. Other statutory restrictions or mandates could bar the debt as a valid claim against the estate.

Concluding, as I do from the aforequoted letters, that the executor has never intercepted the real property for payment of debts, and also that the property was willed to certain designated beneficiaries, it is my opinion that the second assessment was void and the sale thereunder a nullity.

Since both sales are invalid, a redemption therefrom will not lie. Section 288 of the Revenue Act of 1935, and prior laws in force since 1932, authorizing redemption from tax sales, presuppose a valid assessment and sale. In cases of void tax sales, privileged parties are precluded from asserting a right of redemption to which they would have been entitled had the property sought to be redeemed been validly sold.

I premit discussing the validity of assessment of real property in the representative name of and to an executor or administrator who has intercepted the assessed property for payment of debts. The question is not presented in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 17, 1938.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Homestead Exemptions—Time of forfeiture thereof—Crediting exemption certificates.

1. Act of the tax collector in levying an execution on personal property, or in filing with the probate judge a report of delinquency, for the collection of ad valorem taxes, is an act that invokes the machinery of the State for collection of taxes so as to conclude the time for claiming homestead exemption from the payment of 1936-1937 ad valorem taxes for the use of the State.

2. Failure of an exemptioner to file his certificate of credit for lawful homestead exemption with the tax collector before the machinery of the State is invoked to collect his taxes, does not forfeit such exemption, if the certificate was issued before the aid of such machinery is invoked.

3. Before invoking the aid of the machinery of the State for foreclosure of exemptioner's property for the payment of taxes, the tax collector is lawfully authorized to procure from the tax assessor a duplicate credit certificate lawfully issued for homestead exemption and properly to credit the amount thereof before proceeding with foreclosure.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Under date of October 22, 1937, in your opinion to the Hon. O. L. Bethune, Tax Assessor of DeKalb County, you held that a taxpayer could assert his claim for and be given credit for his homestead exemption before the tax collector invokes the machinery of the state to enforce tax collections.

"To clarify this situation I am asking for your opinion on the following questions:

"First, what act of the tax collector invokes the machinery of the state to enforce the collection of taxes?

"Second, if a taxpayer fails to file with the tax collector the certificate of credit given him by the tax assessor before the machinery of the state is invoked does he forfeit his right to the exemption?

"If your opinion on the above question is a negative one am I authorized to give the taxpayer's account credit for the exemption due him upon information furnished me by the tax assessor, by delivering

to me the copy of the exemption certificate? If so, shall I certify to the Probate Judge on March 1 in my list of delinquents, as covered in Section 214, 215, 216, and 217 of the 1935 Revenue Bill, the amount of taxes due, less the amount of exemption given, and shall this amount be embraced in the citation, on the Probate Judge's docket, in the Probate Judge's decree, and in the advertising of lands for sale, and in the sale certificate issued to the purchaser of the lands for taxes?"

Answering your first question, it is my opinion that the act of the tax collector in levying an execution for the purpose of collecting taxes, as authorized by Section 170 (p. 339), Revenue Act of Alabama, (General Acts of Alabama, 1935, p. 256) is an act that invokes the aid of the machinery of the State of Alabama for collection of taxes, and concludes the time within which the exemptioner whose property is levied upon may claim his homestead exemption from the payment of State taxes for the year 1936-1937.

The filing of a report of delinquency with the probate judge, as authorized by Section 216, Revenue Act of Alabama, (General Acts 1935, p. 256) is another act on the part of the tax collector invoking the aid of the machinery of the State of Alabama, for the collection of taxes and which marks the time within which such delinquent taxpayer, whose property is affected, must file his claim for homestead exemption. Either of these two acts definitely sets in motion the machinery of the State for foreclosure of a tax lien, and concludes the right of an exemptioner to claim homestead exemption from payment of State taxes. Reference is made to an opinion of this office dated October 22, 1937, addressed to Hon. O. L. Bethune, Tax Assessor, DeKalb County, Ft. Payne, Alabama, Book 19A (Office Edition) p. 63.

Answering question No. 2, it is my opinion that the failure of a taxpayer or exemptioner to file his lawful certificate of credit for homestead exemption with the tax collector before the machinery of the State is invoked to collect his taxes, does not work a forfeiture of his homestead exemption, provided such certificate of credit was issued before the machinery of the State was invoked to collect the taxes.

In an opinion of this office to Hon. T. L. McKee, Tax Collector, Chilton County, Clanton, Alabama, dated September 23, 1937, reported in Quarterly Report of Attorney General, Vol. VIII, p. 292, this office held that, "It is the duty of the tax collector to give the taxpayer the benefit of the exemption which the Legislature granted and to correct the amount of the certification by crediting the taxes of such taxpayer in an amount equal to that certified by the tax assessor as shown on the original certificate of credit, or on a duplicate thereof but within lawful limits." The tax collector, therefore, has a right to correct his abstract by crediting the amount of the homestead exemption as evidenced by a lawful certificate of credit issued by the tax assessor. The tax collector is lawfully authorized to procure a duplicate of such credit certificate and to credit the amount thereof.

You would have no lawful right to include in your report of delinquency an amount in excess of the tax due after lawful credit has been given as aforestated.

This opinion is restricted to taxes for this tax year, 1936-37.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 19, 1938.

Hon. Wm. W. Hill,
Probate Judge,
Montgomery, Alabama.

Motor Vehicles—License Tax

1. Ambulances, hearses and taxicabs not taxed on monthly declining basis.

2. Automobile for private use brought into Alabama after November 15 in any tax year, by one who has recently taken his residence in state is taxable on monthly declining basis.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

“Schedules 158.1 and 158.5 of Section 348 of the Revenue Act of 1935 are confusing inasmuch as they apply to Motor Vehicles not specifically mentioned in these two sections; that is, Automobiles for private use and trucks are specifically mentioned, but the section is silent as to ambulances, hearses and taxis, and we would like to know if these licenses should be sold on the monthly declining basis under this law.

“There is one more question that we would like cleared: a resident of another state moves into Alabama in the month of August, and Alabama law provides that he must purchase an Alabama Tag. Does he purchase a tag on the monthly declining basis or must he purchase a six months tag?”

Your first inquiry must be answered in the negative. Quarterly Report of the Attorney General, Vol. I, p. 134. The Revenue Act of 1935, Schedules 158.1, as amended by Acts of the Extra Session 1936-37, p. 86, and 158.5, as amended by Acts of the Extra Session 1936-37, page 108, do not purport to deal with taxicabs, ambulances or hearses. They are taxed by Schedules 158.3 and 158.4, respectively, of the Revenue Act of 1935. And in neither of the last cited Schedules is provision made for payment of the tax on a monthly declining basis.

Answering your second question, it is my opinion that the automobile for private use, belonging to one who moves into the State of Alabama after November 15 in any tax year, is taxed on a monthly declining basis, as is provided in the Revenue Act of 1935, Schedule 158.1, as amended by Acts of the Extra Session, 1936-37, page 86. The amended schedule provides:

“Schedule 158.1.—‘PRIVATE CARS’: The following license and registration fee shall be charged on automobiles and motor cars kept for private use: (a) For each automobile or motor car weighing: 2,000 pounds or less—\$5.00 (b) More than 2,000 pounds and not exceeding 2,500 pounds \$9.00 (c) More than 2,500 pounds and not more than 3,250 pounds—\$13.00

(d) More than 3,250 pounds—\$18.00. Provided, however, that for new and used automobiles acquired subsequent to November 15th in any tax year these licenses shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year and that the purchaser shall only buy a license for the then remaining months of the tax year. In figuring the license on a one-twelfth (1/12) reduction for each month, the amount of any fraction shall be figured to the nearest ten (10c) cents above the fraction thereof. But in no event shall the price of license tag be less than two dollars (\$2.00)".

True, under Schedule 158.13 of the Revenue Act of 1935, automobiles acquired or brought into the State after April 1, or being owned within the state but not used or operated between October 1 and April 1, were taxed on the basis of one-half of the license provided by law plus \$1.00. At that time the monthly declining rate of tax applied only to new automobiles for private use. Quarterly Report of the Attorney General, Volume I, page 134. By the amendment, *supra*, the monthly declining rate is applicable to new and used automobiles.

I do not believe that the Legislature intended to levy a greater tax for the identical privilege against a resident of Alabama who had recently removed from another state than is levied against residents of longer standing. The license tax levied on motor vehicles contemplates that the owner pays for the use of the highways. **Williams v. Albany**, 216 Ala. 408. The monthly declining tax scheme is based on the quantum of such use. The new resident who brings his automobile into Alabama from the state of his former residence ought not to be required to pay more for the privilege of using the highways than residents of long standing. I do not think that the Legislature undertook to make such a discrimination.

To the extent that the former opinions of this office appearing in Quarterly Report of the Attorney General, Vol. VI, p. 97 and Vol. VII, p. 45 tend to militate against the conclusion herein announced, the same are amended to conform herewith.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. Frank J. Mizell,
Solicitor 22nd Judicial Circuit,
Florala, Alabama.

1. It is not illegal for a son, nephew, or other relative within the third degree of a member of the Commissioner's Court to hold the office of County Treasurer.

2. A member of the Court of the County Commission is prohibited from voting for his son, nephew, or other relative by blood or marriage within the fourth degree to hold the office of County Treasurer.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter, a pertinent part of which is as follows:

"I do not recall bothering or asking your office for more than one opinion in the past three years, but I am herewith submitting two questions which are of importance, and which I would greatly appreciate your answering by return mail or just as soon as you can.

Question one. Is it illegal for a son, nephew or other relative within the third degree of a County Commissioner, either, to hold the office of County Treasurer; or is such relationship a disqualification to hold such office

Question Two. As a matter of law is a County Commissioner prohibited from voting for a son, nephew, or other relative within the third degree for the office of County Treasurer.

These questions have been referred to me by the County Commissioners of this County, and they are very desirous of having this information just as soon as possible this week."

I wish to call your attention to Section 5076 of the Code of Alabama of 1923, which Section is as follows:

"Letting contracts to relatives or employing relatives of commissioners; penalty for. — Any member of any commissioners' court or board of revenue who shall award any contract in which the county of such commissioner or member of board of revenue is interested to any person related, either by blood or marriage within the fourth degree to such commissioner or member of board of revenue, or who shall employ any such relative to do any work for said county, or to act as agent for any such member in any work in which the county is interested, shall be guilty of misdemeanor and, on conviction, shall be fined not less than ten dollars nor more than one hundred dollars."

The Supreme Court in the case of Garrison against Sommers 223 Alabama 17, 134 Southern 675, in construing the above quoted provision of law held that the mere relationship of a person to a member of the commissioners' court does not in and of itself prohibit such person from working for the county. Therefore, your first inquiry must be answered in the negative.

In the same opinion above referred to, the court held, however, that a member of the commissioners court who voted for or took any part in the employment of a relative within the degree prohibited by said Section 5076, *supra*, would be guilty of a misdemeanor. Therefore, your second inquiry must be answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Probate Judge—Federal Deed Tax—Need not require Federal Revenue Stamp on conveyances before accepting the instrument for recording.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 27, 1938, in which you request my opinion as follows:

"Please give me your opinion as to whether or not a Probate Judge shall require the Federal Revenue Stamp on conveyances before accepting the instrument for recording."

In my judgment, the Probate Judge need not require the Federal Revenue Stamp on conveyances before accepting an instrument for recording. The Federal Tax is levied under title 26, Section 906 (a) of the United States Code Annotated, which does not attempt to affect the recording of the instruments taxed.

Under previous enactments, the Federal Government has provided that unstamped instruments shall not be subject to record. However, even under provisions the courts have held that there was no prohibition against the State in accepting instruments for recording. See note to *Garland v. Gaines*, 84 Am. St. Rep. 193; *Sowell v. Rankin*, 82 So. 317. In the *Sowell* case the Supreme Court of Mississippi says:

"The formalities to be observed in the making and recording of a deed to real property is a matter for regulation by the state in which the property is situated, and not by the general government, so that the United States internal revenue laws providing that unstamped instruments in writing shall be invalid and not subject to record have no application thereto."

In *People v. Frome*, 54 N. Y. Sup. 833, 834, the Supreme Court of New York, speaking to a similar question, said:

" * * * * The responsibility of seeing that the proper stamp is affixed rests upon the parties to the instrument; and the register is no more required to determine the validity under the United States revenue law of an instrument offered for record than he would be to determine whether a deed offered for record contravened some statute of the state, or was offered for the purpose of defrauding creditors, or, for any other reason, was invalid and void. To hold that such a duty rested upon the register would be to constitute him a judicial, instead of a ministerial, officer. The relator having complied with the provisions of the law of this state as to the statement which he desired to have filed, and hav-

ing tendered the necessary fees for such filing, it was the duty of the register to accept the same for recording."

In *Moore v. Quirk*, 105 Mass., 49, 51, we find the following:

"The mortgage was recorded as required by the statutes of the commonwealth. Gen. Sts. c. 151, Sections 1, 3. The clause of the internal revenue act, which provides that instruments not stamped as therein required shall not be recorded, cannot be construed as prohibiting the performance by the officers of the Commonwealth of the duties imposed upon them by its statutes, but must be limited in interpretation and effect to records required or authorized by acts of congress, for the same reasons upon which the prohibition in the same clause against giving unstamped instruments in evidence in any court has been decided to be applicable to the federal courts only, and not to extend to the state courts. *Carpenter v. Snelling*, 97 Mass. 452. *Green v. Holway*, 101 Mass. 243. *People v. Gates*, 43 N. Y. 40. *Clements v. Conrad*, 19 Mich. 170."

The same conclusion is reached in *Stewart v. Hopkins*, 30 Ohio State 502.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1938

Hon. Howard D. Lynes, Sheriff,
Washington County,
Chatom, Alabama.

Court of County Commissioners is vested with authority to appoint janitor for courthouse, also janitor for jail.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge receipt of your letter of December 14, 1937, which is as follows:

"Under Section 211 of the Political Code of 1923 it is my duty to take charge of the courthouse and keep it and the ground attached thereto in order; and under Section 6755, sub-section (2) thereof it is the duty of the court of county commissioners to provide a janitor for the courthouse and to see that he keeps clean and in a sanitary condition the courthouse. You will please advise me whether it is within my power to appoint a janitor for the above purpose, and for the court of county commissioners to pay for same, or is the power of the court to make such appointment?"

"Now under Section 4801 of 1923 Code of Alabama I have the legal custody of the jail, which is a part of the county property and on

the courthouse grounds, and under section 4868 it also my duty to keep the jail clean, etc.

"Under these sections it seems that I am the proper person to make the appointment of a janitor both for the courthouse and the jail.

"If it is my authority to hire such a janitor advise who shall prescribe his salary.

"If the court of county commissioners have the authority to appoint a janitor for the courthouse, and I have the authority to appoint a janitor for the jail who has the power of setting his wages?"

In answer to your inquiry, I am of the opinion that the Court of County Commissioners is vested with the authority to appoint both the janitor for the courthouse and the janitor for the jail. Subsection 2 of Section 6755, Code of Alabama, 1923, as amended by Act 622, Acts 1931, p. 759, provides as follows:

"It shall be the duty of the court to provide a janitor for the court-house and to see that the janitor keeps clean and in a sanitary condition all court rooms, corridors, halls and offices in the court-houses of their respective counties."

This, in my opinion, is direct authority for the appointment by the county governing body of a janitor for the court-house.

Section 4866, Code of Alabama, 1923 provides in pertinent part as follows:

"The Court of County Commissioners, Board of Revenue or City Council, shall provide adequate janitor service for, and shall enforce cleanliness in their respective jails * * *."

Therefore, it is my opinion that the sheriff is not vested with authority to appoint either the janitor for the court-house or the janitor for the jail.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 21, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Ad valorem taxation — Motor Vehicles — Certificate that no tax due.

Under Schedule 158.12 of the Revenue Act of 1935, it is the duty of the Tax Assessor to ascertain whether or not ad valorem tax

is due upon motor vehicle for which application is being made for license tag, and to certify the fact, if it be a fact, that no ad valorem tax is due thereon.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"In some cases an automobile is assessed and there is no tax due on same.

"Please advise me on the following questions:

"(1) Where an automobile is assessed and there is no tax due on same, should the statement showing no tax due be signed by the Tax Collector or the Tax Assessor?"

In my opinion, it is the duty of the Tax Assessor to ascertain and certify to the Probate Judge or other officer empowered by law to issue motor vehicle licenses, the fact, if it be a fact, that no ad valorem tax for the preceding year is due on a motor vehicle for which application is being made for license tag.

Schedule 158.12 (b), of the Revenue Act of 1935, provides the procedure to be followed by the applicant for a license tag. In part it provides:

The Probate Judge is authorized to issue a motor vehicle license upon a certificate of the Tax Assessor certifying that there is no ad valorem tax on said motor vehicle due for the preceding year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1938.

Hon. G. C. Brittain,
County Treasurer & Secretary
Board of Revenue, Calhoun County.
Anniston, Alabama.

1. Prisons and prisoners — Prisoner in ill health confined to hospital under order of Circuit Judge — Guards therefor may be paid by the County under authority of Code Section 4812.

2. County Treasurer liable for paying claim where he has knowledge of facts rendering such claim invalid.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of January 4th in which you request my opinion as follows:

"As Secretary of the Board of Revenue of Calhoun County, Alabama and as Treasurer of Calhoun County, I would thank you to give me an opinion as to the following:

"A man charged with murder was injured in the fight out of which grew the murder charges. He was injured to such an extent that it was not safe to keep him in jail and he was taken to the hospital upon orders secured by the sheriff from one of the Circuit Judges of this circuit. A warrant was sworn out for him for murder and within a few days the grand jury was convened and the man was indicted for murder. He is still in the hospital. The order of the Circuit Judge authorizing or requiring the sheriff to transfer him to the hospital provided for the employment of guards to guard him while in the hospital.

"Please advise me whether or not the county can legally pay the salary or hire of these guards while guarding this prisoners in the hospital.

"Would the county be authorized to pay such guards, either under the provisions of Section 4811 of the Code or under Section 6717 of the Code as amended by the Acts of 1931, pages 66 and 67? If I as county treasurer should receive certificate of the judge showing service of bailiff, knowing that the alleged bailiff was serving as a guard for a prisoner in the hospital under the above circumstances, could I legally pay the certificate or warrant or would I be liable for such payment?

"Thanking you for an early reply, I am."

As you know a Board of Revenue is a court of limited jurisdiction. Whatever power it has must be derived from statutory enactment, and if there is no statute or construction of a statute authorizing the payment of a claim against the county, it can not be paid. **Weakly v. Henry County Treasurer**, 86 So. 46; **Mobile County v. Williams**, 180 Ala. 639.

It is my understanding from your letter that the Circuit Judge required the sheriff to transfer the prisoner in question to the hospital under the provisions of Section 4811 of the Code of 1923. This section and the following two sections provide as follows:

"4811. Removal of prisoners in ill health.—When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail, and that fact is made to appear clearly in any circuit judge, or to the judge of the county court of the county, such judge, must, by an order in writing, direct the sheriff or jailer to remove him to some suitable place, or hospital, as near as may be to the jail, and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail.

"4812. Same; guards summoned.—When prisoners are removed from the jail under the provisions of either of the two preceding sections, the sheriff or jailer has authority, and it is his duty, to summon such guards as may be necessary to insure their safekeeping.

"4813. When jail unsafe, guards summoned to prevent escapes.—When the county jail is insecure or insufficient, and there is reason to apprehend an escape, the sheriff has authority, and it is his duty, to summon as many guards as may be necessary to prevent an escape."

In an opinion reported in Quarterly Reports 2, at page 100, I had occasion to consider a similar question. At that time I stated that I did not find any authority of law that would authorize the payment of the guards summoned under the provisions of Section 4811. I am of the opinion that that statement was erroneous and the same is hereby withdrawn or expressly overruled. The requirement of the court order under Section 4811 is that the prisoner be placed in some suitable place or hospital and there safely kept. It is clear that under these sections the sheriff not only has the authority, but it is his duty to summon such guards as might be necessary to insure the safe keeping of the prisoner. These guards are not public officials, so that the rule of law that a person taking public office is presumed to accept the same with all the burdens thereof, even to acting without pay, does not apply and I find no legal authority for holding that such guards must serve without pay. Since the opinion in Quarterly Reports 2, page 100, above referred to, I have located a case of the Alabama Supreme Court decided in 1871, which seems to carry with it authority for the pay of such guards. This is the case of **Montgomery County v. Barber, Sheriff**, 45 Ala. 237. In that case the sheriff summoned certain guards on account of the unsafe condition of the jail, as authorized by the statute which now appears as Code Section 4813. The county paid these guards for several months and then stopped. The sheriff thereupon paid the guards out of his own pocket and filed a suit against the county to recover the amounts so paid by him to the guards. The Supreme Court sustained his right to recover. I am, therefore, of the opinion that under the authority of this case the county has the authority to legally pay the salary of these guards and that such right is necessarily implied from the provisions of Code Sections 4811, 4812, and 4813.

Your letter requests the further opinion as to your liability for paying a certificate, knowing that the recitals herein are untrue. In this connection, I call your attention to the rule laid down by the Supreme Court in **Mobile v Williams**, 180 Ala. 639, 61 So. 916:

"When there are, either upon the face of the claim or upon the face of the records of the court of county commissioners or otherwise, evidences brought home to the county treasurer that a claim, although allowed by the court of county commissioners, is in fact invalid, then it is the duty of such treasurer to refuse to pay such claim and to present, on behalf of the county, the defense of such county to such claim. If he pays such a claim he does so at his peril."

See also Biennial Report 1928-30, 589 at 590.

However, since payment may be made for the services of guards in the above circumstances, there will be no occasion for the judge to issue

certificate to the guard showing service as a bailiff and this question is now a moot one.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1938.

Hon. Wm. F. Maynor,
County Superintendent of Education,
Blount County,
Oneonta, Alabama.

Schools — Election for special district tax cannot be ordered to be held until special county-wide tax is being levied and collected.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 10, 1938, which is as follows:

"We are wanting to save all the money we can in holding our county-wide three mill tax and our district three mill tax elections. We are wondering if we can hold the county-wide April 26 at one of our elections and the local district tax election on the third of May following. Some of our lawyers do not see anything contrary to legality, however, one says that there must be at least 30 days between these elections, that the law may not be violated, because the first election for the constitutional three mill tax must be voted before the advertisement of the local district three mill tax begins.

"However, both taxes would receive 30 days publication, but there would be an over-lapsing of time of the two advertisements. Inasmuch as these are separate and distinct taxes, but the former must be voted before the last can be, under the law. Under this procedure will these taxes be legal or will we have to give the constitutional three mill 30 days notice and vote on it before we will be allowed to give 30 days notice on the local three mill district tax?"

I am of the opinion that your inquiry should be answered in the negative.

Section 262 of the School Code of 1927 provides as follows:

"Section 262. WHEN DISTRICT TAX CANNOT BE LEVIED.— No election in any rural or city school district shall be held for the purpose of levying and collecting a special school tax for school purposes unless the County in which said rural or city district is located shall be levying and collecting special County taxes for school purposes of not less than thirty cents on each one hundred dollars worth of taxable property in such County."

In construing said section in connection with Constitution of 1901, Amendment III, our Supreme Court has held that the primary and essential condition upon which an election is authorized to be **ordered and held** is the fact that the county is already levying and collecting such a tax.—**Harmon v. County Board of Education**, 230 Ala. 260, 160 So. 687. In other words, the Court of County Commissioners is without authority to order a special district tax election, where petition for election does not allege that county was levying and collecting special county taxes for school purposes.—**Wall-Hay-Wall Lumber Co. v. Mathews**, 211 Ala. 426, 100 So. 824; **Gantt v. Court of County Commissioners of Covington County**, 210 Ala. 125, 97 So., 129. See also **Southern Ry. Co. vs. Webb**, 232 Ala. 324, 167 So. 729; **Opinion of Attorney General to County Superintendent of Education of Houston County** on May 21, 1935; **Opinion of Attorney General to Chairman, County Board of Revenue of Calhoun County** on March 28, 1935; **Biennial Report of Attorney General**, 1926-1928, p. 449.

From the foregoing, it appears that before an election for a special district tax **can be ordered to be held** that the county must be levying and collecting a special county tax. Therefore, the county governing body cannot order the election for a special district tax until this situation exists. In the instant case, the election for the special three mill district tax could not legally be ordered for May 3rd if the election for county tax was not held until April 26th. The election could not be ordered for the district tax until the county tax is being levied and collected. A thirty day notice is required of each election. It would be necessary to wait until after the election of April 26th before the other election could be ordered.

Since you desire to save money by holding the election for the district tax at a regular election, may I suggest that arrangement be effectuated to hold same on the date of the second primary in June which should give sufficient time if the vote is for the county tax on April 26th.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 25, 1938.

Hon. J. Hilton Blount,
Tax Collector,
Washington County,
Chatom, Alabama.

Taxation — Interest on delinquent taxes.

Rate of interest on delinquent 1934 taxes is 8% from delinquent date until effective date of Section 166 of the Revenue Act of 1935, which provided 6% interest on such taxes.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The Ala. Tenn. and Northern railroad went into receivership in 1934 and did not pay the tax due Washington County for that year.

"On December 10, 1937, Mr. John T. Cochrane, Trustee, sent voucher for the tax plus interest at 8% from January 1, 1935 to December 10, 1937.

"I receipted him for the amount, and made my reports and paid the money to the State, County, and School Treasurers.

"Now Mr. Cochrane asks that I return to him \$134.77, claiming that he should only have paid 8% to July 11, 1935, and 6% from July 11, 1935 to present date of payment (December 10, 1937).

"I have a letter from State Comptroller advising me that the 6% rate does not apply to unpaid 1934 tax even if tax is paid after October 1, 1935.

"The question I would like to have answered immediately; What rate of interest should the Ala. Tenn. and Northern R. R. pay on 1934 tax? Should it be 8% for all the time, or when does rate change to 6%?"

In my opinion the rate of interest accruing on 1934 taxes is 8% from delinquent date to and including the effective date of the General Revenue Act of 1935. By Section 166 thereof it is provided:

"All taxes becoming delinquent, bear interest at the rate of six per cent per annum; and such interest must be added to and collected as part of the taxes, and reported in such manner as the State Comptroller may prescribe."

And by Section 407 thereof it is provided:

"Except as otherwise provided in this Act, all the provisions of this Act shall go into effect on the first day of October, 1935."

On and after October 1, 1935 the rate of interest on delinquent taxes is 6%, and not the rate of 8% theretofore provided by law. Quarterly Report of the Attorney General, Vol. I, page 261.

Section 412 of the Revenue Act of 1935 provides:

"Nothing in this Act shall be construed to relieve any person from any tax liability, penalty or forfeiture incurred under laws existing before the effective dates of the provisions of this Act, and any provisions of any laws existing before the effective dates of the provisions of this Act, providing for the collection, and enforcement of such tax liability, penalty or forfeiture shall, as to such tax liability, penalty or forfeiture, remain in full force and effect."

However, in my opinion, this provision does not effect the change in interest rates from 8% to 6% provided by Section 166 thereof, supra.

Subdivision (3) of an opinion addressed to Judge Tompkins, appearing on page 44, Volume VI, Quarterly Reports of Attorney General, holds that ad valorem taxes accruing subsequent to a tax sale held after February 9,

1935, bear interest as 6 percent from February 9, 1935. That opinion is hereby modified to hold that the rate of interest on delinquent ad valorem taxes changes from 8% to 6% on October 1, 1935, and not on February 9, 1935.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1938.

Dr. J. O. Foster,
County Health Officer,
Crenshaw County,
Luverne, Alabama.

County Board of Health is without authority to assess and collect fees for granting permits and issuing certificates to midwives.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 25, 1938, in which you request my opinion as follows:

"Will you please give me an opinion as to whether or not a County Medical Board has authority to assess and collect a fee for granting permits to midwives. May I have your opinion as soon as possible?"

In answering your request I call your attention to Section 1064 of the Code of Alabama, 1928 (Michie's), here provision is made for the registration of midwives and the issuance of certificates by the County Board of Health, but there is no provision made for charging fees for such certificate. Therefore we must look to the general provisions regulating fees and costs. In this connection I call your attention to Section 3665, Code of 1886, which is as follows:

"3665. No fee charged unless expressly authorized. The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

This Section has been brought forward in all of the codes and is now found in the Code of 1923 as Section 7255. Therefore, it is my opinion that the County Board of Health would be without authority to charge a fee for issuing such certificate to midwives. See **Troup v. Morgan County**, 109 Ala. 162.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1938.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation — Redemption of land sold for taxes — Person who has made application to redeem on the installment plan various parcels of land which were sold in his name for the non-payment of 1932 taxes and bid in by the state at the tax sale, in accordance with Section 291 of the 1935 Revenue Act, as amended, and has paid one-fourth of the taxes due, may subsequently pay the taxes in full on certain parcels included therein, and continue his installment payments on the remainder of said parcels.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 10, 1938, which follows:

"On December 30, 1936, Mr. J. H. Webb of this city made application to redeem on the installment plan various parcels of land which were sold in his name for 1932 taxes. Mr. Webb paid one fourth of the taxes due, plus the costs in the sale, in accordance with Section 291, H. B. 324; his application was approved by the State Tax Commission on February 16, 1937, and the redemption was entered on our books on February 18, 1937.

"Included in this redemption were a number of lots in Sunset place, a subdivision of the City of Mobile. Mr. Webb has now requested us to allow him to cut out four of these lots from his installment redemption and pay the taxes on them in full, a transaction which he has recently effected making it imperative that he clear their title.

"We should appreciate your advising us, therefore, if such a redemption comes within the scope of the redemption laws, and if we should allow it."

Hon. N. B. Tompkins, Judge of Probate, Colbert County, Tuscumbia, Alabama, made inquiry of us as follows:

"It seems that the new revenue act approved July 10, 1935, provides that the owner of real estate sold for taxes may redeem any part of such real estate included in the assessment without redeeming all the property assessed. Please advise whether I am correct in this assumption and also whether this partial redemption provision applies to sales made prior to this act."

We answered his inquiry as follows in an opinion addressed to him under date of October 17, 1935, Quarterly Report of Attorney General, Vol. 1, page 88:

"In reply to question 1, I advise that Section 271 of the Revenue Act of 1935 provides as follows:

" 'Section 271. When distinct lots or parcels of land have been included in one assessment and sold for taxes under one decree, any person including the owner, whose interest in one or more of such lots or parcels is such as to entitle him to redeem, may redeem the lots or parcels in which he has such interest, without redeeming all of said property, provided that any owners desiring to redeem any one or more parcels of land must also pay all tax on personal property assessed against him in said assessment, together with all cost of court and advertising fees.'

"This language is so explicit that it is a clear authorization for partial redemptions. There being no limitation on the time, I assume that it applies to any property sold to the State and which is still in the possession of the State."

We also held to the same effect in an opinion to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, Birmingham, Alabama, under date of November 22, 1935, Quarterly Report of Attorney General, Vol. I, page 207. Judge Hawkins asked us to advise him whether or not there may be a partial redemption by the owner from tax sale on the installment basis. In our opinion to him, *supra*, we advised as follows:

"I find nothing in the terms of Section 291 indicating that this application is limited to cases where all the property is redeemed and, in the absence of such language, it is my opinion that the provisions of Section 291 apply to partial redemptions. Of course, the requirements of Section 271, 271-1 must be complied with as in other cases."

As to the general question of whether or not a person may, in availing himself of the privilege of redeeming on the installment plan, pay in multiples of one fourth of the amount due on the property he seeks to redeem, we held as follows in the above cited opinion to Judge Hawkins:

"Does this permission to pay without interest apply to parties who desire to redeem in cash and not avail themselves of the four years partial payment plan? The unreason of charging a person interest who pays cash and not requiring interest of a person who takes four years to pay argues more strongly that it does. On the other hand, it has been pointed out that the statute provides that the party redeeming shall deposit one-fourth of the amount required and 'annually hereafter shall pay, etc.' This has been argued to be a mandatory requirement that such payment shall be annual and that in order to be exempted from the payment of interest the partial payment plan with payments on an annual basis must be strictly followed.

"I am not convinced that so strict a limitation can be placed on the language. In the first place, the language is 'may pay'. This is clearly permissive. The parties 'shall have four years'. This is an outside limitation, I think, not a specific command that such parties must take four years whether they so desire or not. The words 'annually thereafter' do not convey to my mind an absolute requirement that the payments must be annual and can be made in no other way. Coupled with Section 292, it appears to me that unless a party makes the quarterly payments

at least annually, he will be in default. I do not think the Legislature intended to say to a redemptioner: 'If once you elect to follow the partial payment plan, you cannot pay up all the installments and release the property entirely except by making a payment of twenty-five per cent (25%) annually'. Such a conclusion is opposed to sound logic as well as the purpose sought.

"It is, therefore, my conclusion that as to property sold to the State for taxes prior to January 1, 1935, if application is made within four years from the date of sale, redemption is authorized by Section 291 without the payment of interest and this is true whether such redemption be for cash or on the partial payment plan. I think further that should a person paying the first installment desire to complete his future payments in less time than allowed, he has that right, though such payment must be in multiples of one-fourth of the total amount originally due."

This position was reaffirmed after the passage of Act No. 81, General Acts 1936-1937, page 91, approved February 3, 1937, which is an act to further provide for the redemption of real estate heretofore sold for taxes and, prior to January 1, 1935, bid in by the State at tax sale, in an opinion to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of June 26, 1937, Quarterly Report of Attorney General, Vol. VII, page 262. In this opinion we spoke as follows:

"Question 4 of your letter presents a matter upon which an opinion of this office has already been rendered. Quarterly Report, Attorney General, Vol. I, page 207. This opinion refers to the provisions of Section 291, Revenue Acts of Alabama, 1935, and amended by Act 49, General Acts 1936, page 27. There is such a striking similarity and identity between the provisions of Section 291, *supra*, and H. B. No. 259, *supra*, as to the time and manner in which the installments may be paid, that I feel no hesitancy in adopting as a part of this opinion a portion of the opinion as follows: (Then follows the same excerpt from the opinion to Judge Hawkins, which is quoted hereinabove.)

"I, therefore, conclude that the Act of February 3, 1937, authorizes redemption payments of any amount in multiples of one-fourth of the redemption charges originally due. Such anticipation may be made without the payment of any interest or penalties that are waived when redemption is effected through one-fourth annual installments."

Considering all of these opinions, and the provisions of law therein cited and construed, together, it is my opinion that a person who, after making application to redeem on the installment plan several parcels of land which were sold in his name for non-payment of 1932 taxes and were bid in by the state at the tax sale, which said application was duly approved by the property authorities, has paid the first installment due thereon, may pay the total taxes due on certain parcels included therein, and continue his installment payments on the remainder of the parcels. Of course, when he does so, he must comply with all of the provisions of Section 271 of the 1935 Revenue Act, which includes the payment of all taxes on personal property assessed against him in said assessment, together with all cost of court and advertising fees.

Of course, if the party described in your letter is delinquent in one of his installments, or in the payment of taxes which have accrued since the

redemption was effected (and there is nothing before me to indicate whether or not he has paid his second installment, which has already become due, or the taxes which have accrued since the redemption was effected), then the question of whether or not he could pay all taxes due on certain parcels included therein and continue his installment payments on the remainder of said parcels would be a matter that addressed itself to the discretion of the State Land Commissioner, in accordance with the provisions of Section 292 of the 1935 Revenue Act, which reads in pertinent part as follows:

"The State of Alabama shall have a lien on all unpaid partial payments as well as for taxes for any subsequent year, and in case of the failure to pay any one of said installments together with the taxes for the subsequent year, either or both, the State Land Commissioner for and in the name of the State of Alabama, shall at his option declare all said installments due and payable at once."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 8, 1938.

Hon. E. C. Whelan,
License Inspector,
Jefferson County,
Birmingham, Alabama.

License Tax — Foreign Corporation doing business in Alabama erecting bill posts or advertisements not engaged in Interstate Commerce — subject to pay a license tax in each county.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request the following:

"I would appreciate very much if you will give me your opinion as to whether or not the National Outdoor Advertising Corporation of Atlanta, Georgia is liable for Bill Posting or Advertising license under Schedule 23 of the 1935 General Revenue Acts under the following facts: (1) The National Outdoor Advertising Corporation, a foreign corporation, has not qualified to do business as a foreign corporation in this State. (2) They solicited outdoor advertising business in Jefferson County, and on October 16, 1936 entered into a contract with the Banner Baking Company, Inc. of Birmingham to sell and erect 50 Octagonal Display signs upon the highways of Jefferson County. They also sold to or entered into a contract with the R. L. Zeigler Sausage Company of Bessemer, Ala., some 50 or more signs, (3) These signs are manufactured in Atlanta, Georgia and are brought to Jefferson County by an agent or employe of the National Outdoor Advertising Company on their motor vehicle and erected by the employe of the National Outdoor Advertising Corporation, (4) According to the information of this employe, if a sign is

destroyed or in need of repair, he replaces the sign with a new sign or repaints and repairs on periodical trips, going over the highways of Jefferson County when such signs are in need of repair and that is a part of the service that National Outdoor Advertising Corporation renders to the people from whom they get contracts to do their advertising business.

"I am enclosing a copy of their contract with the Banner Baking Company, Inc. as the president of The National Outdoor Advertising Corporation protests the payment of any license because he claims he is doing an interstate commerce business.

"If in your opinion the National Outdoor Advertising Corporation is liable for the license under facts stated, would they have to pay the amount due the State and the amount due the county in each county in which they do business within the State of Alabama, or could they pay a license in a county of less than 30,000 population and then be relieved of paying any further state license in other counties where they do business?"

I will answer your problem by dividing it into two parts, first, as to whether the transaction involved is Interstate Commerce and second, what license if any must be paid.

1. It is my opinion that the National Outdoor Advertising Corporation, under the facts stated, is not engaged in Interstate Commerce and is liable for a license tax under Schedule 23 of Section 348, Revenue Laws of 1935. The erection of billboards in and of themselves is Intrastate Commerce. **Parker vs. Utah**, 285 U. S. 105; **Eberling vs. Foster**, 12 Fed. Supp. 439; **North American Service Co. vs. Vick**, 243 S. W. 549. The only point we have to consider here is the fact that these signs in question were manufactured in Atlanta, Georgia, brought to Birmingham by the National Outdoor Advertising Corporation and erected by the employees of the firm, the National Outdoor Advertising Corporation. The courts have held that where an article shipped in interstate commerce comes to rest at its destination in another state it no longer is an article of interstate commerce. (*U. S. vs. Rigen*, 29 Fed. (2) 1016). But there is an exception to this rule, that is, where the transaction involves only a sale and a delivery from one state to another there is no doubt that the transaction would be in interstate commerce, and where the transaction involves the transporting and constructing and, where the construction or erecting requires special skill so as to make the construction and erection an integral part of the sale, it remains interstate commerce. **Browning vs. Waycross**, 233 U. S. 16; **General Railway Signal Co. vs. Virginia**, 246 U. S. 500. In this particular case no special skill or knowledge is required to erect the signs called for by this contract. Any local labor skilled or unskilled could be employed to do the work of the employees of the National Outdoor Advertising Company, so that this transaction does not come within the exception as outlined above.

In this particular case the general test to be applied is whether the dominant characteristic of the transaction is interstate overshadowing the intrastate features. (*Bay City vs. Frazier*, 77 Fed. (2) 570). The important part of this contract between the National Outdoor Advertising Company and the Banner Baking Company, Inc. is not the manufacturing of the signs but the erection and placing of those signs in advantageous places along the highways of Jefferson County. And the mere erection of a sign is a local act having nothing to do with interstate commerce. **Beard vs. U. & A. Publishing**

Co. 71 Ala. 60; **American Amusement Co. vs. East Lakes Chutes Co.** 174 Ala. 526; **Smythe Company vs. Ft. Worth Glass Company**, 142 S. W. 1157.

Therefore in my opinion the dominant characteristic of this transaction is intrastate and under the test outlined above, this transaction is not one involving interstate commerce. The license tax to be levied herein involves merely the doing of a local act after interstate commerce had completely terminated, i. e., the erection of bill posters. The Statute involved, Section 348, Revenue Laws of 1935, reads:

"348. Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a State license, and a County license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all provisions of this Act."

Schedule 23 of said section reads in part:

"All bill posting and advertising companies displaying advertisement in public places, including street cars and each person engaged in the business of advertising or bill posting * * *."

The words "engaged in the business of" have been defined by the Supreme Court of Alabama (**Beard vs. U. & A. Publishing Company**, *supra*) to be, "there must be a doing of some of the work, or an exercise of some of the functions for which the corporation was created, to bring the case within that clause." Here the corporation is engaged in the business of erecting bill posters and advertisements for which the company was organized.

The contract involved herein not only calls for the erection of certain signs but further the corporation undertakes to "service" the signs and this involves a continuation of "doing business" in this State which again would take this transaction out of the purview of interstate commerce. **Bay City vs. Frazier**, *supra*. I refer you to the following cases where a transaction such as the one involved herein has been held not to be interstate commerce.

Packer corporation vs. Utah, *supra*.

Jello Company, Inc. vs. Landes, 20 Fed. (2) 120.

Motor Supply Company vs. General Outdoor Advertising Company, 44 S. W. (2) 507.

The tax herein sought to be imposed upon the corporation is not one upon the manufacturer of the signs but is really upon the intrastate function, i. e., the privilege of engaging in the business of erecting advertisements which this State has a perfect right to tax.

2. It is my opinion further that the corporation would have to pay the tax provided by Schedule 23 of Section 348, Revenue Laws of 1935, in every county in this State wherein it engages in the business of erecting and "servicing" bill posters or advertisements. Since it does not have any named

place of business within this State, the company comes under the provisions of Section 350 of the Revenue Laws of 1935, which reads in part:

"Section 350. Before any person, firm or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they or it, except as otherwise provided, shall pay to the Judge of Probate of the County in which it is proposed to engage in or carry on such business or do such act, the amount required for such license, and shall comply with all the other requirements of this Act; and upon the payment of such amount and a fee of fifty cents to the Probate Judge for the issuance of such license, and all costs and fees and penalties which shall have accrued, or for which such person, firm or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce payment thereof, and upon compliance with all other provisions of this Act by the applicant, such judge shall issue the license countersigned by him in the form and on the blank to be furnished to him by the State Comptroller, which shall set forth and specify the name of the person, firm or corporation applying therefor, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same if such location shall be a city or town and have a street number, and if not, then the location and amount paid for such license, and the time for which it is issued; and if the license is for a peddler it shall state whether he proposes to travel on foot or on horseback or on wagon or motor vehicle; and such license shall not be transferable except as otherwise provided herein, nor shall it entitle the holder thereof to carry on any other business or do any other act than that named therein. In case it should become necessary to remove any business for which a license is required by this section, from one location to another location in the same county, and such business be continued as the same kind and character and by the same person or firm as that carried on at the former location, another license shall not be required for such business for the same license year. (a) **Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided.**" (Emphasis ours).

Not having an established place of business in this State on which a state and county license tax can be levied, the National Outdoor Advertising Corporation would therefore be considered as engaging in the business of bill posting and advertising wherever it erects signs and each county involved therefor should collect a license tax as set forth in Schedule 23 of Section 348, Revenue Laws of 1935.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 9, 1938.

Mrs. Frank C. Turner,
Judge of Probate,
Washington County,
Chatom, Alabama.

1. Bank designated by county governing body of a county as the depository for the official funds of the various county officials

of said county, including the county treasurer in lieu of a county depository, must fulfill such requirements in regard to the safety of the funds so deposited by said officials as the county governing body shall make.

2. The amount and kind of security which a bank shall give in such a case is a matter that addresses itself to the county governing body. Act No. 60, General Acts 1933, page 51, approved March 10, 1933.

Opinion by the Attorney General.

Dear Madam:

Receipt of your letter of January 10, 1938, a letter from Hon. James N. Granade, President, Chatom State Bank, of same date and a letter from Hon. Wm. G. Lindsey, County Solicitor, Washington County, of January 11, 1938, and copies of an agreement entered into between the Chatom State Bank and Mrs. Willie Long Mills, as custodian of county funds of your county, and a resolution of your county governing body dated December 14, 1936, designating the Chatom State Bank as the depository for all county funds coming into the hands of the custodian of county funds for the calendar year 1937, is acknowledged.

From these various letters and the copy of the agreement and the resolution of your county governing body, I deduce the following facts: For the calendar year 1937 the county governing body of your county was unable to designate any bank in your county to act as county depository in lieu of a county treasurer and the county governing body, by proper resolution, designated Mrs. Willie Long Mills to act as treasurer of your county for that calendar year, though she is designated as the custodian of county funds. Then, the county governing body, by appropriate resolution, designated the Chatom State Bank as the depository for the funds coming into the hands of the various county officials, including the said county treasurer or custodian of county funds, and required the Chatom State Bank to pledge as security for the funds to be deposited with it by the county treasurer certain Washington County, Alabama, Refunding Warrants which the Chatom State Bank did pledge, placing these warrants with another bank to be held in escrow by the bank with which they were placed to be handled by it in accordance with the terms of the escrow agreement. The county governing body required no security from the Chatom State Bank for the funds to be deposited with it by the other county officials. The deposits in the Chatom State Bank are insured by the Federal Deposit Insurance Corporation.

You request my opinion as to whether or not the county governing body has acted in accordance with its legal authority in the premises, and whether or not it has required security, in sufficient amount or kind, from the Chatom State Bank.

The office of County Treasurer has long since been abolished in all counties having a population of not more than 55,000 population. Article II, Chapter 17, Code of Alabama 1923, Sections 312 et. seq. Section 312, supra, was amended in 1932 by Act No. 218, General Acts 1932, page 227, approved November 8, 1932, to make the provisions thereof apply to all counties having a population of not more than 56,000. Therefore, in all counties having a population of less than 56,000 population the office of county treasurer has

been abolished and the duties heretofore performed by the county treasurer are now performed by a bank, designated by the county governing body to act as county depository in accordance with the provisions of Article II, supra. Washington County has a population of less than 56,000 population, Federal Census of 1930. Consequently, the office of county treasurer in Washington County is abolished and the provisions of Article II, supra, as amended, apply in Washington County. Section 316 of Article II, supra, provided the method or manner by which the county governing body shall select a bank within the county to act as county depository in lieu of a county treasurer. This selection is made in December of each year for the following calendar year. It is my understanding that Washington County was unable to designate a bank within the county to act as county depository during the calendar year 1937.

In such a case, the county governing body must, by appropriate resolution, designate some individual to act as treasurer of the county in lieu of the county depository, under such terms and conditions as may be fixed by the county governing body. Section 322, Article II, supra. In December following, the county governing body must make another effort to designate a county depository in lieu of a county treasurer for the next calendar year, and failing in this, must again designate, by appropriate resolution, an individual to act as treasurer in lieu of the county depository, under such terms and conditions as may be fixed by it. It is my understanding that Mrs. Willie Long Mills was the individual designated to so act by appropriate resolution of the county governing body of Washington County for the calendar year 1937, and that she is called the custodian of county funds. Therefore, her bond should have been set by the county governing body in accordance with the provisions of Act No. 191, General Acts 1933, page 203, approved April 20, 1933. Section 11 of said act provides that this bond shall be not less than the largest amount of public funds in the possession of or under the control of such office during the preceding fiscal year. However, Section 15½ of said act provides that if a depository has been designated by the county governing body for the funds coming into the hands of the county treasurer, and it is my understanding that this has been done by your county governing body, the minimum amount of this bond may be fixed at an amount not less than twice the amount of the average daily balance of funds on hand or under the control of such official during that month in the preceding fiscal year when such average daily balance was greatest. This bond should be filed in the office of the judge of probate, as provided by Section 21 of said act.

It is my understanding that upon the application of the various county officials of your county, including the treasurer or custodian of county funds, the county governing body of your county by appropriate resolution designated the Chatom State Bank as a depository in which the county officials might deposit the monies coming into their hands as such officials, in accordance with the provisions of Act No. 60, General Acts 1933, page 51, approved March 10, 1933, and that it required the said Chatom State Bank to give security in the form of certain Washington County, Alabama, Refunding Warrants to secure the safety of the funds to be deposited with the bank by the county treasurer or custodian of county funds, but that no such security was required of said bank for the purpose of securing the safety of the funds to be deposited in it by the other county officials, since all deposits in said bank are insured by the Federal Deposit Insurance Corporation up to \$5,000.00 on each such deposit and the county governing body deemed this to be sufficient security for the funds to be deposited in said bank by the various county officials other than the county treasurer or custodian of county funds. This

was within the legal authority and power of the county governing body of your county. Section 2 of Act No. 60, *supra*, reads in part as follows:

"Such court shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State."

Therefore, the question of what security will be required by the county governing body of a bank designated by it as a depository for the funds coming into the hands of the various county officials is a matter that addresses itself to the sound discretion of the county governing body. There is nothing before me to indicate that the county governing body of your county has abused its discretion in the premises and its action in this regard is not inconsistent with the general laws of this state. Consequently, they have acted within their legal authority and power in the premises. Of course, in such a case the county governing body should always take care to make such requirements of the bank designated as depository for the funds of the county officials as will be certain to safeguard the funds which come into the hands of said officials.

The provisions of Act No. 30, General Acts 1933, page 19, approved March 8, 1933, which is an act amending Section 317 of the Code of Alabama 1923, in regard to the amount of bond or security that must be given by a bank acting as county depository of a county in lieu of the county treasurer, is not applicable to the situation in your county, since the Chatom State Bank is not so acting, but instead, is merely a depository designated by appropriate resolution of the county governing body, into which the various county officials, including the county treasurer in lieu of a county depository or custodian of county funds, may deposit the monies coming into their hands as such officials, in accordance with the provisions of Act No. 60, *supra*, for the purpose of protecting such officials from liability on their official bonds in case of the dissipation or loss of such funds because of the insolvency or failure of the said bank.

For a treatment of the general subject of the law in regard to the selection by a county governing body from year to year of a bank within the county to act as county depository in lieu of a county treasurer, or in case the county governing body is unable to designate a bank as such depository, the selection by it of an individual to act as treasurer in lieu thereof, we respectfully refer you to the case of *Jenkins v. State ex rel. Watson*, 219 Ala. 554. You will note from a reading of this decision and the above mentioned sections of the Code which it construes, that a county depository in lieu of a county treasurer or an individual to act as treasurer in lieu of a county depository, must be selected by the county governing body in accordance with the provisions of our statutory law during December of each year for the following calendar year.

We respectfully decline to express an opinion on the question of whether or not the Federal Deposit Insurance Corporation law would insure up to \$5,000.00, deposits made by a county official up to this amount in several different accounts, for instance, an account of the general fund of the county, an account of the Road and Bridge Fund of the county, an account of the

Gasoline Tax Fund of the county, an account of the Fine and Forfeiture Fund of the county, etc., since this is a Federal law and must be interpreted by the Federal authorities.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 9, 1938.

Hon. John S. Pollard,
Tax Assessor,
Dallas County,
Selma, Alabama.

Homestead exemption—

1. Certificate of credit issued in name of deceased exemptioner on application of husband should be credited on taxes.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I refer to your letter as follows:

"Please advise whether or not the Tax Collector of Dallas County is justified under the law for giving credit to taxpayers with a certificate of credit given by the Tax Assessor to the taxpayer under the following statement of facts:

"1. In this case I am enclosing for your information taxpayers' copy of Exemption Claim No. 2314. You will please note the name of the taxpayer is Massy Cobb. He swears and subscribes before me that the property is owned by five people; that four of the five people live upon the property, and in the same home. Therefore, I have given four-fifths exemption on the total assessed value of the property described. I have set out in the body of the Exemption Claim the description thereof, and have also stated in the body of said claim that the above property is assessed to Nellis Menefield, Abner Childers, Massy Cobb, Mamie Menefield, and Lizzie Sawyer. Massy Cobb claims to be head of this family, and signed the affidavit as such.

"Massy Cobb presented his Certificate of Credit at the time that he asked to be allowed to pay his taxes, and his certificate was not accepted for the reason that Massy Cobb had no assessment in his name, though it did appear in the assessment as shown in the preceding paragraph of this letter. The names appearing on the Collector's Abstract are in the same order as shown on the taxpayer's assessment.

"2. A husband and wife who were occupying their home as of October first nineteen thirty-six, and prior thereto; the property is assessed

in the name of the wife, who dies before making her exemption claim. The husband comes before me, and affirms that he and his wife occupied this property as of October first, and as she died prior to making her claim, that he is entitled to the exemption. Whereupon, I issued the claim in his name as taxpayer, and write in the body of the exemption claim the above stated facts.

"3. Mrs. Mamie S. Walker appears before me, stating that the home in which she lives, and has lived and owned for many years, is her own property for her lifetime. This property is assessed to her only daughter, Mrs. Erin W. Wood, as Trustee of all of Mrs. Mamie S. Walker's property. This statement is written in the body of the Exemption Claim.

"In this case, Mr. William M. Polk, Examiner out of the State Tax Commission Office had me send for Mr. Milton O. Wood, the husband of Mrs. Erin W. Wood, who came to the office, and under oath explained to Mr. Polk the reason of the Trusteeship, and took oath that the property belonged to Mrs. Mamie S. Walker, and that she occupied the same as her homestead. Mr. Polk thereupon approved the claim.

"Every Exemption Claim which I have issued has a number. Every Certificate of Credit bears the same identical number as the Exemption Claim. These numbers I have written in the margin of the Tax Collector's Abstract Book, opposite the names, which correspond exactly with my assessments on which the homestead exemption was granted."

With reference to the first question propounded in your letter, I refer you to an opinion of this office to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama, under date of August 10, 1937, Quarterly Reports of the Attorney General, Vol. VIII, page 66, with special reference to Section (e) thereof, in which I held that a "joint tenant with others of unpartitioned real estate who occupies a portion thereof, is entitled to homestead exemption out of the joint property, but his fractional ownership of the homestead does not enlarge the area of its operation so as to make up in quantity what is wanting in extent of ownership." Please also refer to an opinion of this office to Hon. O. S. Nichols, Tax Assessor, Perry County, Marion, Alabama, under date of July 8, 1937, reported in Vol. VIII, Quarterly Reports of the Attorney General, page 19, in which we held that each joint owner is entitled to his proportionate share of exemption on homestead. These two opinions are full authority for granting the exemption to Massy Cobb, according to the facts outlined in your letter. I premit discussion of the right of Massy Cobb to pay his taxes without payment of all the taxes assessed against the joint heirs.

It is my opinion that your second question should be answered in the affirmative. This office held in an opinion to Hon. T. D. Woodham, Tax Assessor, Dale County, Ozark, Alabama, under date of August 10, 1937, Quarterly Reports of the Attorney General, Vol. VIII, page 66, Section (g), that the status of a homestead exemption for the tax year 1936-1937 is determined by the status of the property as of October 1, 1936. According to the facts stated in your letter, the wife was living on October 1, 1936, and, if so, the status of her homestead was determined as of that date. The subsequent death of the exemptioner would not defeat the right of her estate to the benefit of the exemption to which she was entitled on October 1, 1936.

It is my opinion that the credit certificate, if not otherwise unlawful, should be credited to the taxes due by the estate of the deceased and that

the issuance thereof in the manner indicated in your inquiry was in due conformance with law.

I am unable to answer your third inquiry because the facts therein stated are insufficient for me to determine the validity of claim for exemption. It will be necessary for you to attach a copy of the trust agreement in order that I may determine the several legal phases that might be involved and that grew out of the trust agreement.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 9, 1938.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Counties — Equitable claims and demands — Tractor company which, in good faith, advanced tractor for the use of the county may be reimbursed for the rental or for the value thereof by the county governing body under Section 186 of the Code of 1923.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"On or about January 1936, the Commissioners Court of Chilton County entered into an agreement with the State Highway Department to pave or black top the State Highway between a point four miles West of Clanton and the Chilton County line, a distance of about twenty-two miles, the county paying and bearing one-third of the expenses and shortly thereafter work was commenced upon this project. The agreement with the State Highway Department provided that the county might use on said project any of its road machinery and would accordingly be given credit upon settlement with the State Highway Department for a fair rental for the use of said machinery. A tentative order was executed by one of the County Commissioners with J. D. Pittman Tractor Company of Birmingham, Alabama, for the purchase of a Deisel tractor, subject to the approval of the Commissioners Court and subject to the commencement of said Three-way Project on the Clanton-Selma state road.

"Under a Local Supervisor's Bill, Acts 1926, page 4, a supervisor was appointed for Chilton County and the supervisor assumed office on May 1, 1936. Also a Local Act was approved March 10, 1936, Acts 1936, at page 3, providing that machinery and supplies purchased for Chilton County, in an amount exceeding \$150.00 must first be advertised. Without an

order being passed for the purchasing of said Deisel tractor, and at the request of the supervisor (a fact which is denied by him) a Deisel tractor was delivered to Chilton County about the 26th of May, 1936 and commenced work on the said Three-Way Project and continued work on the project until probably ninety days ago when the work was finished, said tractor has also been used on the county roads under the supervision of the supervisor. The State Highway Department admit a credit due Chilton County for the use of said tractor of an amount around \$3,000.00, and also said tractor has been used for probably ninety days on the county roads. The J. D. Pittman Tractor Company has been paid no amount or rent and no compensation has been paid to them either by the State or County for the use of said Deisel tractor, which was a new machine. The local supervisor's bill provides that the Commissioners Court may purchase machinery and supplies, etc., upon requisition by the Road Supervisor.

"Will you, therefore, please advise me whether or not the Commissioners Court can legally pay the J. D. Pittman Tractor Company a fair and reasonable amount for rental for the use of said Deisel tractor on said Three-way Project and also will you please advise me whether or not the Court of County Commissioners can legally pay the J. D. Pittman Tractor Company a reasonable rental for the use of said tractor on the county roads."

I have examined the local statutes cited in your request for opinion, but have concluded that the real basis for the payment by Chilton County of the demand of the Pittman Tractor Company is the authority contained in Section 186 of the Code of 1923.

I provides, in part:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. * * *"

It is, therefore, my opinion that the county governing body of Chilton County may legally pay to the tractor company either the reasonable rental value of the said tractor or may pay the reasonable value and accept title thereto.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 11, 1938.

Hon. J. A. Carnley,
Probate Judge,
Coffee County,
Enterprise, Alabama.

Taxation — Trailer License Tag—

An applicant for a trailer license tax provided for by Schedule 158.11 of Section 348 of the Revenue Laws of 1935, is not entitled to a monthly declining rate.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request the following:

"Schedule 158.11 of the Revenue Code of Alabama, reads as follows—
'Every small trailer and semi-trailer shall pay a license tax of fifty per cent (50%) of the cost of the license tax on the motor vehicle by which it is drawn. The purchaser shall specify the truck to which it is to be attached and shall pay one-half ($\frac{1}{2}$) of the amount of that license.'

'If a person who has owned a truck and purchased tag for said truck in October, applies for trailer tag in February, or in any other month, will I be permitted or have authority to issue to said applicant a tag for the remainder of the fiscal year, or an eight month tag, or is he required to pay full year price? Would it make any difference if the man purchased both truck and trailer and applies during the same month for tags, will he be permitted to purchase tags for both truck and trailer on monthly declining basis?

"It seems that trailer tags should be issued on monthly declining basis, but the receipt books furnished by the Tax Commission only show they can be issued for whole year and half year."

The issuance of a license tag for a trailer is provided for by Schedule 158.11 of Section 348 of the Revenue Laws of 1935 at p. 323. This provides that the cost of a trailer tag is one-half of the cost of a license tag for the vehicle to which the trailer will be attached. The provisions of the law in reference to a monthly declining rate in the purchase of license tags are found first in the Laws of 1935 at p. 1141 but this provision is only for "automobiles" and "motor cars" kept for private use. The only other provision for a monthly declining rate is found in the Laws of 1936-37 at p. 108 which amends Schedule 158.5 of Section 348 of the Revenue Laws of 1935. Again this provision applies only to "motor trucks". A trailer, small trailer or semi-trailer as used in Schedule 158.11 is defined in Schedule 158 of Chapter 6, Article 13, Revenue Laws of 1935, at p. 517. It is impossible therefore to apply the provisions of the law for a monthly declining rate to a trailer which is covered by Schedule 158.11. The only reduction that can be allowed by law in the purchase of a license tag for a trailer is that provided in Schedule 158.13 of Section 348, which allows the purchase of a tag for a "motor vehicle" for one-half year

under the conditions as prescribed in Section 158.13. Under the term "Motor Vehicle"; the definition reads: "Every vehicle as herein described which is self-propelled, or which is drawn by a self-propelled vehicle." So that under the facts stated, one who applies for a trailer tag in February should have to pay the license on a full year basis. A trailer tag can be procured for one-half year only as provided in Schedule 158.13, which reads in part:

"One-half ($\frac{1}{2}$) of the license herein provided for shall be paid plus one dollar where the motor vehicle is required or brought into the State on or after April 1 of any year, or is not used or operated between the period from October 1 through March 31 following * * *"

It would make no difference if the truck and trailer were purchased at the same time and application made for license tags for both vehicles at the same time.

A monthly declining rate basis is specifically provided for motor trucks by the Laws of 1936-37 at p. 108. And this act is fully explained by an opinion of this office to Hon. F. B. Thompson, Judge of Probate, Clay County, dated February 1, 1938, a copy of which I am enclosing for your attention.

It is therefore my opinion that the provisions for a monthly declining rate cannot be applied in the case of a trailer. The Supreme Court many times has held (see *State vs. Kidd*, 125 Ala. 413, 28 So. 480), that, "Exemptions from taxation must be clear and unambiguous and may not be deducted and allowed from language of doubtful import."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 21, 1938.

Hon. Alex Brantley,
Judge of Probate,
Pike County,
Troy Alabama.

Elections — Candidate entitled to have name placed on ballot where such candidate, within the time for qualifying, withdraws and requalifies, thus complying with the law in all respects, regardless of whether he had previously announced his candidacy and failed to comply with Section 588 of the Code of 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 28, 1938, in which you request my opinion as follows:

"A candidate for a County office announced his candidacy, and six days later qualified with myself and the Chairman of the County Dem-

ocratic Executive Committee. Realizing that he had waited one day longer than the law requires, he notified me and the County Chairman on February 26 in writing of his withdrawal and published a notice in a local paper that he had withdrawn.

"On February 28th, he filed his qualification papers with me, as Probate Judge, as a candidate for the same office, also with the Chairman of the County Committee and on February 28th, he had published in a local paper his announcement that he is a candidate for the same or original office. Under the above circumstances, will you please give me your opinion on the following:

"1. In your opinion, is the candidate, in question, entitled to be placed on the ballot under the above conditions?

"2. Would I, as Judge of Probate, be liable in any way, Civil or Criminal, to place him on the Ballot under the above conditions?"

Answering your first inquiry, I advise you that, in my judgment, the said candidate is entitled to have his name placed on the ballot.

Section 588 of the Code of Alabama of 1923 provides, in part, as follows:

"Any candidate shall, within five days after the announcement of his candidacy for any office, if the office be a state office, file with the secretary of state, and if the office be a county office, file with the judge of probate of said county, and if it be a district or circuit office, file with the judge of probate of each county which is embraced in said district or circuit, the name of not less than one nor more than five persons elected to receive, expend, audit and disburse all moneys contributed, donated, subscribed or in any way furnish or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such person to act as such committee, but any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose.

Under the facts stated by you, the candidate in question filed his statement of the parties designated to receive, expend, audit and disburse contributions more than five days after insertion of political advertisement in a newspaper. However, it appears that the candidate has withdrawn his original qualification papers and within the time allowed by law requalified with the Chairman of the County Executive Committee and with the probate judge. The provisions of the corrupt practice law being penal in their nature must be strictly construed and may not be extended to cover situations beyond the precise scope covered by those sections of the law directly involved. **Doughty v. Bryant**, 226 Ala. 23, 25, 145 So. 420. Certain it is that only a very strained construction of Section 588 could prohibit a candidate, having once qualified for the office, from withdrawing his candidacy. It is entirely possible that a candidate for one office may decide to withdraw and requalify for another office. Or, a candidate having inadvertently failed to meet the qualifications or having violated one of the provisions of the corrupt practice act, and desiring to comply with such provisions, may withdraw and requalify. The law only applies to that candidate who has failed to file the statement required within five days after the announcement of his candidacy for office, as that term is used in the statute. The candidate mentioned in your inquiry even if he failed to comply with the law on his first attempt, appears to have now come within

it in all respects and as such is properly entitled to have his name placed upon the ballot.

Inasmuch as my opinion upon your first inquiry is that the candidate has complied with all the requirements of the law and is entitled to have his name placed on the ballot, it necessarily follows that your second inquiry must be answered in the negative.

No opinion is expressed herein as to whether the five days period allowed by Section 588 of the Code begins running from the date upon which the candidate files his declaration with the party authority or from the date of publication of a newspaper in which he makes the first authorized announcement of his candidacy. An expression on that question is not necessary to this opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938.

Hon. J. M. Hobbie,
Tax Collector,
Montgomery County,
Montgomery, Alabama.

Taxation — Tax Collector

1. Sale for delinquent taxes is to be made for the taxes remaining unpaid after deducting homestead exemption.
2. Credit for homestead exemptions should be given before the list of unpaid taxes is delivered to the Judge of Probate.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of March 7, 1938, wherein you request the following:

"Will you be kind enough to give me a prompt opinion on the following matter,

"Taxes on the property of Mr. A have not been paid, but Mr. A has claimed and received a homestead exemption certificate from the Tax Assessor. Should I, as Tax Collector, sell this property for the full amount of taxes due, or should I sell it for the amount of taxes less the amount of the homestead exemption certificate issued by the Tax Assessor?"

"If I should sell it for the amount less the exemption certificate, how and when should I credit this exemption certificate? Should I give credit before reporting this list to the Judge of Probate in which he will issue a decree of sale?"

By Sections 47 and 55 of the Revenue Laws of 1935 (General Acts of 1935, p. 281 and 285) it is the duty of the tax assessor to enter in the assessment book all assessments and all deductions from taxation by exemptions allowed to the tax payer, including therein homestead exemptions. Thereafter the State Tax Commission from this assessment book prepares a certificate (See Section 56 of Article I, General Acts of 1935, p. 286) showing the aggregate amount of taxes due on the property in the county and specifying the amount due to the state, county, special district tax, etc. And this certificate should show the net taxes due the state after deducting the homestead exemption. This certificate pursuant to Section 56, supra, is the warrant to the tax collector to collect such taxes as shown by the assessment book.

So that under the procedure outlined above the tax collector has only to collect the taxes shown in the assessment book and a sale for delinquent taxes is only for those set forth in the assessment book, wherein the deduction for homestead exemption has already been allowed. (See Section 215 of the Revenue Laws of 1935, General Acts of 1935 at p. 351).

I conclude therefore that the sale of the property, as set forth in the facts you give me, should be for the amount of taxes unpaid less the homestead exemption certified by the tax assessor.

Section 215 of the revenue Laws of 1935, supra, requires that the tax collector prepare a book, to be delivered to the Judge of Probate, describing the property on which taxes are unpaid, and further, stating the amount of taxes that are unpaid; specifying the amount due the state, county, etc. It is my opinion that the tax collector should credit the homestead exemption in this book prior to its delivery to the Judge of Probate. This book is to be prepared from the assessment book in which the tax assessor, as stated above, has already shown the homestead exemption.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Taxation—Assessment for ad valorem taxation of business in existence before October 1st of any year is based on average amount of goods, wares and merchandise on hand during preceding year or part thereof, but in no case less than capital actually employed. In case of new business, one commenced on or after October 1st of

any year, the assessment for that year is based on capital actually employed on pro rata basis. "Capital employed" includes all assets of business without deducting liabilities.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 2, 1938, which is as follows:

"Please give me your opinion regarding the following questions:

"(1) If a party opens a business on or between October 1, and January 1, 1937, should he assess same for 60% of the amount of capital employed for taxes due October 1, 1938?

"(2) If a party opens a business on or between January 1, and March 31, 1938, should he assess same for three-fourths of 60% of the amount of capital employed for taxes due October 1, 1938?

"(3) If a party opens a business on or between April 1, and September 30, 1938, should he assess same for one-half of the amount of capital employed for taxes due October 1, 1938?

"(4) If a party opens a business after the Tax Assessor has closed his books should said assessment be treated as an escape?

"(5) If a party opens a business on any of the above mentioned dates should same be assessed on October 1, 1938 for taxes due October 1, 1939, on 60% of the average value of the stock on hand for the preceding year but in no case not less than 60% of the amount of capital actually employed?

"(6) In basing his assessment on the capital employed should he treat the stock of merchandise as capital and not offset any part of same with liabilities?

"(7) In using the capital employed as a basis of the amount of his assessment would not 'Capital Employed' be the entire amount set up on his books as assets of the business including cash?

"I wish to call your attention to Section 10 (d) of the Revenue Act of 1935, also opinion of the Attorney General April 20, 1927, page 161, Biennial Report 1926-1928; April 2, 1936, Vol. III, page 8; and section 10, (m) Revenue Act of 1935; Attorney General's opinion July 6, 1920, page 575, Biennial Report of 1918-20 case of State vs. Seals Piano Company, (1923) 209 Ala. 93, 95 So. 951, case State vs. Buchfield Brothers (1924) 211 Ala. 30, 99 So. 198, also Capital City Company vs. Montgomery, 117 Ala. 303, 23 So. 970."

Your inquiries involve a construction of Section 10 (d) of the Revenue Act of 1935, which is as follows:

"Section 10. The subjects of taxation, except as exempted by law, shall be as follows: * * * (d) All stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, **except in cases where business is commenced on or after October 1st of a current year, and in such cases the assessment to be on the capital actually employed in the business and apportioned as herein-after provided**, but the amount so assessed for any whole year shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares and merchandise kept on plantations or elsewhere, or by railroad companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequent to the first day of October of a current year, **but in such case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the 1st day of January the tax shall be three-fourths (3/4) of the tax for the whole year; if commenced after the first day of April the tax shall be one-half (1/2) of the tax for the whole year; provided that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers.** If the person, association or corporation, receiver or trustee carrying on such business shall fail to make return of the amount of stock of goods, wares and merchandise as provided by law, or if the county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the last inventory made of such stock of goods, wares or merchandise, and may also by inquiry of persons believed to have knowledge of the subject obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment." (*Italics supplied*).

Said subsection was a rewrite of subdivision (d) of Section 5 of the Revenue Act of 1919, which is as follows:

"Section 5. The subjects of taxation, except as exempted by existing laws, shall be as follows: * * *d. All stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares and merchandise kept on plantations or elsewhere, or by railroad companies or manufacturing companies, or other associations, companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequently to the first day of October of a current year, but in such case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the first day of January, the tax shall be three-fourths of the tax for the whole year; if commenced after the first day of April the tax shall be one-half of the tax for the whole year; provided that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers. If the person, association or corporation carrying on such business shall fail to make return of the amount of stock as provided by law, or if the county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the last inventory made of such stock of goods, and may also by inquiry of persons be-

lieved to have knowledge of the subjects, obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment."

It will be noted that the 1935 Act materially changed the 1919 Act. The wording of both Acts is ambiguous and a careful analysis is necessary to arrive at the legislative intent.

In construing the 1919 Act this office held that no assessment of the stock of goods can be made in the tax assessment year in which the merchant goes into business.—**Biennial Report of Attorney General, 1926-1928**, p. 161. The changes in the 1935 rewrite of subsection (d) were evidently for the purpose of changing this ruling.

Under both Acts in cases of a business in existence a whole year preceding October 1st of any year, all stocks of goods, wares and merchandise are assessed on the average amount on hand during the preceding year, but in no case less than the capital actually employed in the business. The confusion arises in cases where a business is commenced on or after October 1st of any year.

In cases where the business is commenced on or after October 1st of any year, I am of the opinion that the assessment is made for that year on the capital employed. The second and third clauses of the 1935 Act provide "except in cases where business is commenced on or after October 1st of a current year, and in such cases the assessment to be on the capital actually employed in the business and apportioned as hereinafter provided." (This portion was added in the 1935 Act). The manner hereinafter provided does not immediately follow the above quoted clauses but is several lines below and is as follows: "* * * but in such cases the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the 1st day of January the tax shall be three-fourths (3/4) of the tax for the whole year; if commenced after the first day of April the tax shall be one-half (1/2) of the tax for the whole year." This provision modifies the first quoted provision above although there may be intervening clauses. Such, in my judgment, is the legislative intent and the only logical construction of the ambiguous wording of the Act.

From the whole context of the 1935 Act, as rewritten in contrast with the 1919 Act, it follows that the Legislature intended that a business commenced on or after October 1st of any year should pay ad valorem taxes due that year in proportion to the time it commenced business, the tax being based on the capital actually employed in the business rather than the average amount of goods, wares and merchandise as in the case of an old business. In a new business there would be no average amount on hand during the preceding year. I do not think it was intended that a new business, one commencing on or after October 1st of any year, should wait until the following October to make its assessment, thus escaping ad valorem taxation for a portion of a year. This position is strengthened by subsection (m) of Section 10 of the 1935 Act, which is as follows:

"(m) All property brought into the State after the first day of October and before the Assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the State on the first day of October."

This shows the general intention to tax property brought into the State after October 1st of any year. The Legislature, in dealing with the specific subject of taxation of businesses, kept this general principal in mind and dealt with the matter in a more specific manner; viz., the proration method as above set out.

If a business is commenced after the tax assessor has closed his books the assessment may be treated as an escape. It is the duty of assessor to list such property for taxation when discovered although no penalty attaches. —Quarterly Report of Attorney General, Vol. III, p. 8.

The assessment of a business commenced on or after October 1st of any year for the October following should be on the average amount of goods, wares and merchandise on hand during the preceding year, but in no case less than the capital actually employed. The term "preceding year" as used in the 1935 Act does not, in my opinion, necessarily refer to a full or whole year.

From the foregoing, it follows your inquiries Nos. 1, 2, 3, 4 and 5 should be answered in the affirmative.

In my opinion your 6th and 7th inquiries should be answered in the affirmative. "Capital employed," in my opinion, includes the entire amount set up on his books as assets of the business including cash and same cannot be offset by any part of the liabilities. *Ellis v. Handley Manufacturing Co.*, 214 Ala. 539, 108 So. 343.

The above conclusions are in accordance with the administrative construction placed on the Act under consideration by the State Tax Commission. Although an administrative construction is not controlling, it is given great consideration in the construction of ambiguous statutes.—*Alabama Power Company v. Patterson*, 224 Ala. 3, 138 So. 421; *State v. Tuscaloosa Building and Loan Co.*, 230 Ala. 99, 161 So. 530.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Mrs. Peter Preer,
Member, Board of Registrars,
Macon County,
Tuskegee, Alabama.

Elections—Residential requirements for registration—Persons who will have at the time of the next general election subsequent to the date of registration the residence qualifications required by Section 178 of the Constitution 1901, held qualified to register although such persons may not possess said residence qualifications at the time of registration.

Elections — “Next general election” as referred to in Section 181 of the Constitution held to mean general election for election of officers as distinguished from primary election held for the purpose of nominating candidates.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter of February 8, 1938, in which you request my opinion as follows:

“There has been quite a bit of discussion about a person being eligible for registration who has been in the state for more than two years, but in the county only, say, for six months. Of course, by the next general election (in November) he would have been in the county for twelve months. Isn't it legal to allow him to register in the 10 day session in January? The application blank reads that way to me, but I would like very much to have your ruling on this point.”

Under date of February 21, 1938, you further inquire as follows:

“I wrote you last week in regard to registering those who have not been in the County a year, but who will have been by the next general election, which means the Nov. Election. I would like to get this straight and a ruling from you, as there has been some discussion in regard to this. This clause applies to General election and not to Primaries as I understand it.—am I correct?”

In reply to your first letter I wish to refer you to Section 181 of the Constitution of Alabama which provides in part as follows:

“After the first day of January, nineteen hundred and three, the following persons, and no others, who, if their place of residence shall remain unchanged, will have, at the date of the next general election the qualifications as to residence prescribed in Section 178 of this article, shall be qualified to register as electors; provided, they shall not be disqualified under section 182 of this constitution.” (Emphasis ours).

I wish to further refer you to Section 178 of the Constitution of Alabama which provides in part as follows:

“To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him. * * *”

You will note that the provisions of Section 181 of the Constitution quoted, supra, when considered and read with the provisions of Section 178 of the Constitution quoted, supra, unequivocally provide that a person desiring to register in the State of Alabama shall be entitled to register if at the time

of the next general election, his residence remaining unchanged, said person shall have the residence requirements set out in Section 178 of the constitution, supra, namely; (1) He must have resided in the state at least two years. (2) He must have resided in the county at least one year. (3) He must have resided in the precinct or ward three months, all immediately preceding the election at which he offers to vote.

I wish to further call your attention to Section 381 of the Code of Alabama 1923 which sets out the qualifications for registration in Alabama as follows:

"The following persons and no others, who, if their places of residence shall remain unchanged will have, at the date of the next general election the qualifications as to residence prescribed by section 178 of the constitution of 1901, shall be qualified to register as electors provided they shall not be disqualified under the laws of the state; (Emphasis ours).

"1st. Those who can read and write any article of the constitution of the United States in the English language, and those who are physically unable to work; and those who can read and write any article of the constitution of the United States in the English language and who have worked or been regularly employed in some lawful employment, business or occupation, trade or calling for the greater part of twelve months next preceding the time they offer to register, and those who are unable to read and write, if such inability is due solely to physical disability; or

"2nd. The owner in good faith in his or her own right, or the husband of a woman or the wife of any man who is the owner in good faith in her or his own right of forty acres of land situated in this state, upon which they reside; or the owner in good faith in his or her own right; or the husband of any woman or the wife of any man who is the owner in good faith in his or her own right of real estate situated in this state, assessed for taxation at the value of three hundred dollars, or more; or the owner in good faith, in his or her own right, or the husband of any woman or the wife of any man who is the owner in good faith in her or his own right, of personal property in this state assessed for taxation for three hundred dollars or more; provided that the taxes are due upon the real or personal property for the next year preceding the year in which he or she offers to register shall have been paid, unless the assessment shall have been legally contested and is undetermined."

The question of residence requirements for registration for voting in Alabama has caused no little confusion for a considerable length of time. I have therefore felt it proper to set out in detail the above quoted provisions of the law and to further call your attention to opinions of the Attorney General directed to the question contained in the instant inquiry. The following opinions of the Attorney General are in accord, and consistent with the holding announced in the instant opinion and are therefore referred to with approval:

1. An opinion addressed to Honorable Thomas R. Ferris, County Board of Registrars, Montgomery County, under date of December 10, 1931, re-

ported in Office Edition, Vol. 7, p. 168, holds that a person offering to register who will have acquired residence in the county at the time of the next general election shall be permitted to register.

2. An opinion addressed to Miss Bernice F. Crumpton, Clerk of the County Board of Registrars, Ashland, Alabama, Clay County, under date of February 16, 1932, holds that if a person will have at the date of the next general election the requirements of residence in Alabama, said person shall be given the right to register.

3. An opinion addressed to Hon. H. L. Clark, Chairman, County Board of Registrars, Florence, Alabama, reported in Office Edition, Vol. 8, p. 273, holds that, "A person does not have to live in a county twelve months in order to register, * * *."

4. An opinion written to Hon. J. A. Williams, under date of January 11, 1932, Circuit Clerk of Chambers County, LaFayette, Alabama, reported in Office Edition, Vol. 8, p. 97, quoted the opinion addressed to Hon. Thomas R. Ferris cited, *supra*. I do not therefore quote the holding of this opinion here.

5. An opinion addressed to Hon. W. O. Crowley, Chairman of the Board of Registrars, Geraldine, DeKalb County, Alabama, under date of February 25, 1932, deals with the question of how one may acquire residence in the state for voting purposes.

6. An opinion addressed to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Alabama, under date of September 12, 1935, and reported in Vol. 6-A, Office Edition, sets out age and residential requirements for registration.

7. An opinion addressed to Mrs. Jessie W. Nunnellee, Chairman Board of Registrars, Montgomery County, Alabama, under date of January 6, 1936, reported in the Quarterly Report of Attorney General, Vol. II, p. 5, ask the following question, "Is it not the law that those who have been in the county two years prior to the next general election are entitled to register?" This question is answered in the affirmative.

8. An opinion addressed to Hon. Chas. E. McCall, State Auditor, reported in the Quarterly Report of the Attorney General, Vol. II, p. 76, further points out the above named requirements for registration of voters in Alabama.

In my judgment all of the above cited opinions state true and correct propositions of law in so far as the registration of voters is concerned, and are in agreement with the holding here announced on this particular question.

I wish to further call your attention to the following opinions which not only are not in agreement with the holding here announced but in my judgment do not state correct propositions of law and are hereby expressly overruled.

1. Opinions reported as follows; Biennial Report 1928-30, p. 694, addressed to Hon. J. B. Dykes, under date of December 6, 1929; Biennial Report 1926-28, p. 337, addressed to Hon. C. F. Winkler, Judge of Probate, Green-

ville, Alabama, under date of October 26, 1927; opinion addressed to Mrs. M. D. Holman, Chairman of Board of Registrars, Sumter County, Livingston, Alabama, under date of December 16, 1935. All of these conflicting opinions are set out in the opinion addressed to Hon. Chas. E. McCall cited, supra, where the same are expressly overruled.

I also call your attention to an opinion addressed to Hon. J. H. Holland, Board of Registrars, Winston County, Haleyville, Alabama, under date of January 29, 1936, reported in the Quarterly Report of the Attorney General, Vol. II, p. 73, which is in accord with the holding announced in the instant opinion and is here referred to with approval, and refer you to the case of *Shepherd v. Sartain*, 64 So. 57, wherein the ruling of the Supreme Court on related questions are not inconsistent with the holding announced herein.

In reply to your second question, I wish to advise that in my opinion the words "Next general election" as used in Section 181 of the constitution refer to the general election held in November and not to the primaries held in May and June. I refer you to an opinion of the Attorney General, reported in Biennial Report 1928-30, p. 719, addressed to Hon. Chas. E. McCall, wherein a very clear distinction is drawn between a primary election and a general election. I call your particular attention to the definition of "Primary Election" in said opinion which is as follows:

"A 'primary election' denotes an election held by a Political Party for the purpose of selecting candidates for public office."

I further call your attention to Section 601 of the Code of 1923 which defines primary election: "Primary Election within the meaning of this chapter is an election held by the qualified voters who are members of any political party for the purpose of nominating a candidate or candidates for public or party office."

From the above definitions you will note that primary elections are confined to the selection of candidates from a political party and that it is quite a different thing from a general election which is held for the purpose of filling public office by the election of candidates for said office.

It is therefore my opinion that the clause "Who * * * will have, at the date of the next general election, the qualifications as to residence prescribed in section 178 of this article, shall be qualified to register as electors, * * *", means the general election held in November for election of officers as distinguished from the primary election or elections held for the purpose of nominating candidates.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. Hunter Phillips,
Tax Assessor of Choctaw County,
Butler, Alabama.

Under Homestead Exemption Act (General Acts 1936-37, page 113) owner of adjoining tract of land or an interest therein is entitled to include said tract in Homestead Exemption where said other tract is bona fide and habitually used as a part of said homestead.

Where tract does not adjoin homestead, is leased, and total of the two tracts exceed statutory area, said tract cannot be included as part of homestead.

Opinion by Assistant Attorney General Thomas.

Dear Sir:

I am in receipt of your letter of September 21st stating:

"Mr. B. J. Ezell owns a home in the small town of Lisman, Alabama, valued at \$400.00, on which he is entitled to the homestead exemption credit. In addition to his home he owns an undivided one eighth interest in his father's estate which consists of 566 vacant lots in the town of Lisman, and which is assessed in the name of the heirs, on a separate assessment from that of Mr. Ezell. There is a part of this undivided property that adjoins the home place of Mr. Ezell, on which he has about 10 acres in cultivation. Please advise me if Mr. Ezell will be entitled to the exemption on the estate property.

"I have also two ladies who live on a tract of 55½ acres, and have another tract about two miles north of the home place on which their farm is located. The farm is rented and the rent received from this farm of 285 acres is their sole source of income. Will these ladies be entitled to claim enough of this acreage to make out the total of 160 acres?"

I am of the opinion that Mr. Ezell is entitled to include his one eighth interest in the 10 acres of estate property which he has under cultivation if said cultivation is in connection with his use of his homestead as such, subject to restriction that total sum of \$2,000.00 only can be claimed by all parties together in total tract owned together. As to the balance of the estate property he is not entitled to include his interest therein in his claim for homestead exemption. The Homestead Exemption Act reads as follows (1936-37 General Acts page 113):

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama.

Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937.

Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption

exceed Two Thousand Dollars (\$2,000.00) in assessed value nor one hundred sixty (160) acres in area."

Section 205 of the Constitution of Alabama provided that "any lot in a city, town or village, with the dwelling and appurtenances thereon owned and occupied by any resident of this State, and not exceeding the value of \$2,000.00, is exempted as a homestead."

This provision of the Constitution as to homesteads has been construed in the case of *Emrich v. Gilbert Manufacturing Company*, 35 So. 322, 138 Ala. 316, which holds that where one owns an undivided interest in a lot, and uses and occupies it in connection with the lot on which the main part of his residence is situated, such interest, together with the lot, not exceeding \$2,000.00 in value, is subject to homestead exemption.

The case of *Tyler v. Jewett*, 2 So. 905, 82 Ala. 93, states that under the Constitutional and Statutory provisions exempting any lot in a city or town as a homestead, two or more adjoining lots, may be claimed as a homestead if occupied as such. The facts in the *Emrich v. Gilbert Manufacturing Company* case are practically identical with the *Ezell* situation, and under that and the *Tyler v. Jewett* case, I am of the opinion that Mr. *Ezell* can claim his undivided one eighth interest in the 10 acres directly adjoining his homestead if used as above stated.

As to whether the two ladies you mentioned are entitled to homestead exemption of the 285 acre tract, the Supreme Court in a similar statement of facts in the case of *Turner v. Turner*, 107 Ala. 465, held that such tract was not part of the homestead. The court, after mentioning certain cases states (1-107 Ala. at page 469):

"These cases hold that a disconnected tract not contiguous to the tract upon which the dwelling is situated, but bona fide and habitually used as a part of it, may, by such use, become impressed with the homestead character, notwithstanding its remoteness or separation from the mansion house, but 'this ruling has not been extended further than to embrace two parcels, already used and appropriated to homestead purposes where they together do not exceed the statutory area and valuation.' *Jaffrey v. McGough*, supra."

It therefore appears that the ladies would not be entitled to exemption because the two disconnected tracts exceed the statutory homestead area.

As to your statement that the rent received from the separate tract is the sole source of income of the ladies, the court in the case of *Turner v. Turner*, supra, made the following statement:

"It is argued by appellant's counsel that the use of the rents, from the hotel for the support of the decedent's family, constituted such a connected use of the disconnected property, as to impress the latter with the homestead character. It was expressly decided in *Kaster v. McWilliams*, 41 Ala. 302, that while the renting of land may be a source of profit which contributes to the support of the family, yet that is not the sort of use intended; the statute contemplating the use of the thing not of its profits or of an income derived from it. That case has been repeatedly cited and its principle reaffirmed in our subsequent de-

cisions, (Murphy v. Hunt, 75 Ala. 438; Lehman v. Bryan, 67 Ala. 558; McConnaughy v. Baxter, 55 Ala. 379), and is conclusive against the correctness of appellant's contention."

See also **Dexter v. Stroback**, 56 Ala. 233.

I am therefore of the opinion that the ladies in this case are not entitled to homestead exemption out of the 285 acre tract.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. Hamp Draper,
Associate Member,
Board of Administration,
Capitol.

Whenever a convict is sentenced to the penitentiary and under Section 3242 of the Code of 1923 elects to serve pending appeal and the case is reversed, the convict cannot claim the benefits under Section 3650 of the Code of Alabama 1923 as to money, transportation and clothes.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 17, 1937, in which you request my opinion as follows:

"Will you please advise if a prisoner who has been convicted in the lower court and who has appealed to the higher court who elects to serve in the penitentiary pending outcome of his appeal and whose case is reversed and remanded on appeal, is entitled to the ten dollars (\$10.00) and other benefits provided for in section No. 3650 of the code when he is dismissed from the penitentiary after his case is reversed and remanded."

Whenever a convict begins serving his sentence pending appeal, he does this voluntarily and not by force of law.

I call your attention to Section 3242, Code of Alabama 1923, which is as follows:

"Waiver of benefit of suspended sentence.—In all cases where there is judgment suspending sentence, at any time before the transcript has been forwarded to the clerk of the appellate court, the defendant in person, or by his attorney, may waive the benefit of the suspended sentence by filing in the office of the clerk of the court in which the case

was tried, a statement in writing to that effect, signed by himself or his attorney of record, and the clerk must then enter the fact and date of such waiver of suspension of sentence upon the margin of the record of the judgment and shall report said convict to the president of the state board of administration or to the convict department, as in cases where there is no judgment or suspension of sentence, but such waiver of suspension shall not affect the appeal."

I also call your attention to Section 3650 Code, of Alabama 1923, which is as follows:

"Convict provided with clothing and money when discharged.—Each convict, at the expiration of his term of confinement, must be discharged from the penitentiary, and must be furnished with a decent suit of clothes and money sufficient to enable him to reach his destination, not exceeding ten dollars; but if any convict is sick at the time his term expires, he must not be discharged except at his own request. If such convict is charged with the commission of any other criminal offense, he must be delivered to the proper sheriff or officer to answer such charge, under such rules and regulations as may be prescribed by the board."

You will note the latter section says: "Each convict, at the expiration of his term of confinement, * * *" shall be furnished money and clothes, etc. If the defendant elects to serve during his appeal and the case is reversed by the higher court, this cannot be said to be the expiration of his term. Of course, it may be or it may not be, depending wholly on what happens on retrial of the case in the lower court. Therefore, I do not believe this statute applies to convicts of this class.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Board of Revenue,
Macon County,
Tuskegee, Alabama.

Counties—May issue interest bearing warrants against gasoline fund. Cannot issue bonds or warrants against general fund without an election except for specific purposes set forth in County Financial Control Act. (General Acts 1935, p. 803).

Opinion by Assistant Attorney General Screws.

Gentlemen:

This is to acknowledge receipt of your letters of February 8, 1938 and February 12, 1938, in which the following inquiry is presented:

"The Board of Revenue is desirous of borrowing \$15,000.00 for the purpose of building roads, payable within 10 years.

"We have a margin of borrowing power of \$15,000.00 under the Constitution.

"Can the Board of Revenue issue warrants or Bonds for that purpose without holding an election for the same."

A definite answer to your inquiry depends on the fund against which the warrants or bonds will be issued.

If the warrants in question are to be issued against the gasoline fund, your inquiry is answerable in the affirmative. Interest bearing warrants may be issued by counties against the gasoline fund without an election.—**Quarterly Report of Attorney General, Vol. 5, pp. 32 and 38; Herbert v. Perry**, (Ala. Sup. Ct.) 177 So. 561. I am enclosing copy of the Supreme Court opinion for your information.

On the other hand, if the warrants or bonds are to be issued against the general fund of the county as general obligations of the county, your inquiry must be answered in the negative. In such a case an election will be necessary.

Section 222 of the Constitution of Alabama, 1901 reads as follows:

"The legislature, after the ratification of this constitution, shall have authority to pass general laws authorizing the counties, cities, towns, villages, districts, or other political subdivisions of counties to issue bonds, but no bonds shall be issued under authority of a general law unless such issue of bonds be first authorized by a majority vote by ballot of the qualified voters of such county, city, town, village, district, or other political subdivision of a county, voting upon such proposition. The ballot used at such election shall contain the words: 'For * * * bond issue. and 'Against * * * bond issue' (the character of the bond to be shown in the blank space), and the voter shall indicate his choice by placing a cross mark before or after the one or the other. This section shall not apply to the renewal, refunding, or issue of bonds lawfully issued, nor to the issuance of bonds in cases where the same have been authorized by laws enacted prior to the ratification of this constitution, nor shall this section apply to obligations incurred or bonds to be issued to procure means to pay for street and sidewalk improvements or sanitary or storm water sewers, the cost of which is to be assessed, in whole or in part, against the property abutting said improvements or drained by such sanitary or storm water sewers."

While Section 224 thereof provides:

"No county shall become indebted in an amount including present indebtedness, greater than three and one-half per centum of the assessed value of the property therein; provided, this limitation shall not affect any existing indebtedness in excess of such three and one-half per centum, which has already been created or authorized by existing law to be created; provided, that any county which has already incurred a debt exceeding three and one-half per centum of the assessed value of the property therein shall be authorized to incur an indebtedness of one and a half per centum of the assessed value of such property in addition to the debt already existing. Nothing herein contained shall prevent any

county from issuing bonds, or other obligations, to fund or refund any indebtedness now existing or authorized by existing laws to be created."

The Legislature passed, in its 1927 Session, an Act to provide a code of laws authorizing and governing the issuance, sale, regulation, funding, re-funding, paying and retiring of bonds of the counties and municipal corporations. This Act is a complete enactment on the subject and supersedes the former provisions of our statutes on the same. It is Act No. 478, General Acts 1927, page 534, approved September 10, 1927, and is generally referred to as the Municipal Bond Code of 1927.

This Act has been amended several times. While some of these amendatory Acts may not be material to the question with which you are concerned, I here give you the citation of each of said Acts in the order in which the same were enacted:

Act No. 363, General Acts 1931, page 428, approved July 10, 1931; Act No. 489, General Acts 1931, page 601, approved July 22, 1931; Act No. 153, General Acts 1932, page 172, approved October 28, 1932; Act No. 213, General Acts 1932, page 215, approved November 8, 1932; Act No. 46, General Acts 1933, page 22, approved March 10, 1933; Act No. 47, General Acts 1933, page 29, approved March 10, 1933; Act No. 58, General Acts 1933, page 49, approved March 10, 1933; Act No. 70, General Acts 1933, page 60, approved March 15, 1933; Act No. 195, General Acts 1935, page 575, approved July 17, 1935.

Also, for your information, I list below citations of all cases by the Supreme Court of Alabama construing any of the provisions of said Municipal Bond Code of 1927 as amended:

Browder v. Gunter, et al., 220 Ala. 407; Merchants' Securities Corporation v. City of Atmore, 220 Ala. 682; Frasch v. City of Prichard, 220 Ala. 418; Howard, City Clerk v. State ex rel. McGarry, 226 Ala. 215; Moore v. Howard, City Clerk, 227 Ala. 219; Phillips v. Atkins, et al., 229 Ala. 15; Carey v. City of Haleyville, et al., 230 Ala. 401; City of Marion v. Underwood, 231 Ala. 225; Garner, County Treasurer v. Jefferson County, ex rel Whistler, 175 So. 352.

Of course, all of these decisions may not bear directly on the proposition before the governing body of your county, but I simply give them to you so that you may have a complete reference to all of the cases decided by the Supreme Court concerning any phase of the bond law.

It seems very clear from the provisions of Section 222 of the Constitution, above quoted, that the Legislature is without authority to pass a law authorizing a county to issue bonds unless such issuance is first authorized by a majority vote by ballot of the qualified electors of the county, though said section does give the Legislature express authority to pass laws authorizing the issuance of such bonds in compliance with the provisions of that section. The Municipal Bond Code of 1927, as amended by the Acts hereinabove cited, is the present law of the state, enacted by the Legislature in accordance with the provisions of Section 222, *supra*.

It seems very clear that your county can, by complying with the provisions of the Municipal Bond Code of 1927, as amended, *supra*, issue bonds as general obligations of the county in any amount up to, but not exceeding, the constitutional debt limit of the county, which debt limit is a mixed ques-

tion of law and fact to be determined in the manner provided by Section 224 of the Constitution.

In connection with your inquiry I wish to refer you to Act No. 379, General Acts 1935, page 803, approved September 9, 1935, which is generally referred to as the County Financial Control Act. I particularly refer you to Section 9 of said Act, which gives authority for the issuance of refunding warrants for the purpose of refunding all warrants, etc., which are unpaid and past due at the time said Act went into effect and for the payment of which no money was available at the time; to Section 11 thereof, which authorizes the making of temporary loans in anticipation of the collection of taxes; and to Section 17 thereof, which provides for the issuance of interest bearing warrants for the purpose of paying emergency obligations as defined by said section. So far as I know, these are the only situations in which a county may issue its interest bearing warrants or certificates of indebtedness, and seemingly the situation before your county at the present time does not come in any of these categories.

Therefore, it would seem that the only way your county could issue bonds, etc., for the purpose of raising the funds with which to finance or partly finance its part of the road building program now under way in your county as general obligations of the county, is in the manner provided by the Municipal Bond Code of 1927, as amended, *supra*, which, of course, would entail the submission of the question to a vote of the qualified electors of your county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Costs—Sheriff's fees incident to an inquisition of lunacy should be paid out of the lunatic's estate if solvent, otherwise by the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 22, 1938, in which you state:

"We have had an inquisition as to whether or not a man was of sound mind. The Jury found him insane, and his wife has qualified as his Guardian. This man owns a farm which is encumbered and he is paid a pension from the Federal Government as a disabled Veteran.

You request my opinion as follows:

"Please advise whether or not under the above circumstances, the Sheriff would receive his pay for summoning jury and witnesses in this case from the county."

In answering your question, I am not attempting to pass on the solvency of the estate involved, as I do not have enough facts before me.

In my opinion you should collect the fees by execution out of the lunatic's estate. If the estate is insolvent, then the fees should be paid by St. Clair County.

Section 7287 of the Code of Alabama provides in part as follows: •

"Section 7287. FEES ALLOWED TO SHERIFF.—Sheriffs are entitled to receive the following fees for the following services:

* * *

"Services in relation to persons of unsound mind, the same fees as are allowed for similar services in other cases, to be paid out of the county treasury, if such person have no estate."

See opinions of this office to Hon. M. C. Thomas, Sheriff, Jackson County, Alabama, under date of April 20, 1935, (Office Edition, Book 3, p. 312); Hon. B. Cooper, County Treasurer, Marion County, Alabama, under date of April 28, 1931, (Office Edition, Vol. III, p. 312, March 1, 1931-April 30, 1931).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. John I. Smith,
Tax Collector,
Etowah County,
Gadsden, Alabama.

Taxation—Exemption from ad valorem taxes cannot be prorated.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of February 5, which is as follows:

"I will appreciate your opinion with reference to the following matter that has arisen in this office.

"The Episcopal Church purchased from one O. C. Bottoms, on this day, a house and lot in Gadsden, for church purposes. It being the intention of the church to use the property as a parish house.

"The property has been assessed by Mr. Bottoms for the tax year and the church is claiming that the taxes should be pro-rated on the current assessment, that is, Mr. Bottoms should be assessed for taxes due to Feb. 5, 1938, and the remainder of the year exempted to the church.

"The assessor has taken the position that Mr. Bottoms is chargeable with the taxes for the entire year, notwithstanding that he sold the property to the church on Feb. 5th."

In reply to your inquiry, I advise that exemption from ad valorem taxes cannot be prorated. Ad Valorem taxes are due and payable on October 1 and become a lien against the property. **State vs. Doster-Northington Drug Company**, 196 Ala. 447, 71 So. 427. As an assessment is a judicial determination, it is final unless impeached for fraud or lack of jurisdiction, or reviewed by an appellate authority. **State s. Mortgage Bond-Company of N. Y.** 224 Ala. 406, 140 So. 365.

To allow a proration of ad valorem taxes, merely because the property was sold to a church during the current tax year, would, in effect, authorize the remission of an obligation due the state. This is specifically prohibited by Section 100 of the Constitution of Alabama, 1901, which provides in part as follows:

"Section 100. No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, * * *"

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Licenses—No license required of person engaged solely in the business of operating a radio repair shop.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 3, 1933, in which you request my opinion as follows:

"I respectfully request your opinion as to whether or not the Revenue Act of 1935 levies a privilege license for the sole purpose of repairing radios.

"Schedule 117 of said Act levies a license on the business of selling radios, but does not require a license for repairing radios.

"Some of the State license inspectors have insisted that a person operating a radio repair shop, from which no sales of radios are made, should procure a license under Schedule 56 of said Act, which covers dealers in electric, gas or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, and/or for each electrical or gas repair, or electrical or gas supply shop. . .?"

In my opinion there is no license imposed by the General Revenue Laws of 1935 upon persons engaged solely in operating a radio repair shop. As you state, Schedule 117 of said Act levies a license on the business of selling radios and manifestly is not applicable to a party who does not sell radios but only repairs them.

Schedule 56 of the General Revenue Laws of 1935, to which you refer, provides as follows:

"For each dealer in electric, gas or other mechanical REFRIGERATORS, electric or gas HEATERS, electric or gas WATER HEATERS, electric or gas STOVES, and/or for each electrical or gas repair, or electrical or gas SUPPLY SHOP: In cities of:

"100,000 or over	\$30.00
50,000 to 100,000	20.00
10,000 to 50,000	10.00
Less than 10,000, whether incorporated or not	5.00"

There is a well-known and ancient maxim "ejusdem generis", which rule of construction may be resorted to if the intention of the statute is not clear. The rule of "ejusdem generis" means that, where a general term in a statute follows specific words of like nature, it takes its meaning from the latter, and is presumed to embrace the persons or things of the kind designated by the specific words. 1 Words & Phrases, 4th Series, page 844.

Applying the doctrine of "ejusdem generis" to the following provision, the word "electrical", as underlined in the above quoted section, would appear to refer to electrical refrigerators, heaters, water heaters, stoves, etc., rather than to radios. I therefore advise you that the words "electrical * * * repair * * * shop", as used in Schedule 56, apply not to a shop wherein radios are repaired, but to the shops catering to the repair of the particular devices or appliances designated in the statute.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. Nathaniel Almon,
County Supt. of Education,
Lawrence County,
Moulton, Alabama.

Schools—The term "per annum," as used in Act No. 160, S. 126, approved March 2, 1937, (General Acts 1936-37, page 181) in connection with maximum expense of \$600.00 per annum allowable to certain County Superintendents of Education, is construed to mean the year running concurrent with the years of the terms of office of the superintendents affected.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 8, 1938 which is as follows:

"The Legislature in 1937 passed a bill allowing Superintendents of Education whose salaries did not exceed \$3,000 and was not already allowed an expense account. The expense account is not to exceed \$600 per year. This county falls in that group, and I am desiring some information as to when the year begins, so will appreciate your answer on the following question.

"When is the official year of this expense bill to begin? In my mind there are three possible dates. March 1st when the bill went into effect, Jan. 1st, and October 1st which begins the official fiscal year.

"Please inform me which of the above dates or what date is my expense year begins? This is very important to enable me to keep our records and expense account correct annually as required by this recent act."

In answer to your inquiry, it is my opinion that the term "per annum" as used in Act No. 160, S. 126, approved March 2, 1937 (Gen. Acts 1936-37, p. 181) in connection with the maximum expense allowance allowable certain County Superintendents of Education, means the year running concurrently with the year of the terms of office of the Superintendents affected. In other words, it is the official year or year of office.

The act under consideration is as follows:

"Section 1. The Boards of Education in Counties, where the maximum salary of the Superintendent of Education is prescribed by law, are hereby empowered to fix, approve, and authorize the payment of the travelling expenses incurred by the Superintendent in the performance of his official duties within the County and the expenses incurred by him when his official duties require him to go outside of the County.

"Section 2. The Superintendent of Education, whose expenses are authorized to be paid under the provisions of this Act, are hereby required to file with the County Board of Education on or about the 1st

day of each month a certified itemized statement of the traveling expenses incurred by him in the performance of his official duties within the County and the expenses incurred by him when his official duties required him to go outside of the County, for the preceding month, upon forms to be prescribed by the State Board of Education. Upon the approval by the County Board of Education of the expenditures herein authorized, the same shall be paid as other obligations. The accounts shall be verified by affidavit, and the total of such accounts shall in no event exceed the sum of Six hundred Dollars per annum. (*Italics Supplied*).

"Section 3. It is hereby expressly declared that it is not the legislative intent of this Act to increase the salary of the Superintendent of Education of any County of the State but merely to reimburse the Superintendent for necessary and legitimate traveling expenses actually incurred in the efficient performance of his duties. The provision of this Act shall not apply to Superintendents of Education whose salaries amount to three thousand dollars per annum or more nor to any Superintendents of Education who receive expenses under local acts heretofore passed by the Legislature of Alabama.

"Section 4. All laws and parts of laws in conflict herewith are hereby repealed.

"Section 5. This Act shall take effect immediately upon its passage and approval by the Governor.

"Section 6. Provided, however, this Act does not repeal or invalidate any general Act on the subject which has local application based on a County population basis.

"Approved March 2, 1937."

As used in statutes the meaning of the term in question is dependent on the subject matter and the connection in which it is used. It may be a period of twelve months or twelve calendar months beginning on a day other than the first day of January. It may mean a political year or a period between two elections, **official year or year of office**, a college year, a school or scholastic year, a fiscal year, an excise year, a license year, etc., 62 C. J. 965 & 966.

Construing the act in question as a whole it is my opinion that the term "per annum" which modifies the \$600 maximum expense allowance, means an official year or year of office. The act provides that it shall not apply to Superintendents whose salaries amount to \$3,000.00 per annum or more. The term there used clearly refers to the official year or years of office. All sections of the act must be construed in *pari materia*.

In order to effectuate the purpose of the act without endless confusion and ambiguity as to the different county superintendents that may be affected, the above construction of the term under consideration is necessary. The terms of office of the various county superintendents affected vary both as to the beginning and the length and any other construction than above would be practically unworkable. If the term were given any other meaning, a county superintendent whose term expired before the year as otherwise

computed could possibly receive the maximum expense allowance, and his successor would be without said allowance until said year had elapsed. If term is computed concurrently with the years of the term of office, this situation is avoided.

The above conclusion in my judgment expresses the true legislative intent as to the meaning of the term under consideration. Statutes are given a practical and workable construction when possible.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 26, 1938

Hon. D. B. Borden, Clerk,
Circuit Court, Hale County,
Greensboro, Alabama.

1. When a confession of judgment in a criminal case is taken in open court by the Presiding Judge it is approved by him.

2. When a confession of judgment in a criminal case is taken in open court, it is governed by the civil law as to execution and other procedure.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 7, 1938 in which you request my opinion as follows:

"1. Who is supposed to approve sureties for a confession of judgment in County and Circuit Courts?

"2. When a confession of judgment is made in open court how much time should expire before an execution should be issued?"

If a confession of judgment in a criminal case is taken in open court by the presiding judge as is provided by Section 5288, Code of Alabama, 1923, it should be approved by him. If the presiding judge takes the confession, the fact he takes the same is an approval of the confession.

Answering your second request as soon as the confession is made or taken in open court it becomes a civil procedure and is governed by the same law as to execution and otherwise as other civil matters. **Goldsmith vs. Mayor Alderman at Huntsville**, 120 Ala. 182. Section 2589, Code of Alabama, 1923.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 28, 1938

Hon. D. B. Borden, Clerk,
Circuit Court of Hale County,
Greensboro, Alabama.

Witness Fees—

1. State Highway Patrol officer is not entitled personally to witness fees in criminal cases—such fees are payable to the State Highway Patrol Fund.

2. Agents of the Alabama Beverage Control Board are entitled to witness fees and mileage when appearing as witnesses in criminal cases.

3. It is the duty of the clerk to issue a certificate to a witness for the miles traveled in reaching the court from and to his residence by the usually traveled route.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request the following:

“Please give me an opinion on the following: Should members of the A. B. C. Board and the Alabama Highway Patrol be paid witness fees and mileage in cases that are tried in Circuit Court, where the members of such departments have arrested violators of the law? If so, should more than one person be paid mileage when they travel in the same automobile? If such a payment is lawful what point is supposed to be the place traveled from in order to attend court by members of the A. B. C. Board and by the State Highway Patrol?”

Members of the Alabama Highway Patrol are to be paid witness fees, but by the Laws of 1935, Section 11 thereof, at p. 760, it is provided that:

“Provided, however, that no State Highway Patrol Officer shall be entitled to any costs for attending any courts, but instead, the proper authorities shall collect such fees and mileage that are due such officers for attendance on any court or for any official act and to promptly turn same into the Highway Patrol Fund, * * *”

See also opinions of the Attorney General, Quarterly Reports, Vol. VI, p. 108 and Vol. VIII, p. 117.

Agents and members of the Alabama Beverage Control Board are entitled personally to be paid witness fees and mileage in cases that are tried in Circuit Courts, when they are subpoenaed as witnesses. See Quarterly Report of the Attorney General, Vol. VIII, p. 258; Vol. VI, p. 17; Vol. IV, p. 23 and Vol. III, p. 35.

For the purpose of the accrual of witness fees and mileage, law enforcement officers of the State are considered as any other individual who might appear as a witness. Section 7233, Code of Alabama, 1923, provides that witness are allowed mileage "to and from their residences by the usual traveled route, * * *" and Section 7234, Code of Alabama, 1923, provides that the Clerk of the Circuit Court must on application of the witness, and upon oath, give to him a certificate setting forth among other things the number of days attended and the sum to which he is entitled for his attendance and mileage.

The oath of the witness as provided by Section 7234, *supra*, is for the protection of the clerk and at the same time to secure the making of a proper certificate and the Supreme Court has held in **Friddle vs. Braun**, 7 Ala. App. 429, 61 So. 57, that the oath is not a mandatory prerequisite to the validity of the certificate, but in the words of the court at p. 433, "The clerk may properly issue the certificate if he has knowledge of the correctness of the items sought to be charged by the witness, without requiring oath to be made of facts already within his knowledge, but **must** issue it when the witness accompanies his application with an oath as to correctness of the items." (Italics the Court's).

Therefore, it is my opinion that where the witness makes his oath, he is to be given a certificate showing the mileage to be paid from and to his residence by the usually traveled route without considering how the witness reached the court.

Section 7233, Code of Alabama, 1923, uses the residence of a witness as a starting point. The courts in interpreting this section have held that witnesses are entitled to fees for the whole number of miles traveled even when in excess of one hundred miles. See **Alabama Midland Railway Co. vs. Rushing**, 103 Ala. 542, 15 So. 853.

The word residence as used above does not mean domicile, but is to be considered as meaning the place where the witness now resides even though such residence be temporary. See opinion of Attorney General, **Quarterly Reports**, Vol. VIII, p. 166. In the case of the State Highway Patrol and agents of the Alabama Beverage Control Board, under the facts you supply me, the word "residence" would mean the place where they were stationed at the time they were to appear as witnesses.

Therefore, it is my opinion that agents of the Alabama Beverage Control Board and members of the State Highway Patrol are to be paid mileage for the actual number of miles traveled in reaching the court from and to their residence by the usually traveled route; subject, however, to the limitation expressed in the Laws of 1935, *supra*, that in the case of the State Highway Patrol, the fees are to be paid directly to the Highway Patrol Fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 31, 1938

Hon. Joe M. Pelham, Jr.,
Circuit Judge,
Washington County,
Chatom, Alabama.

1. Elections—Individual performing duties of Judge of Probate or other officer disqualified from performing duties relative to absentee ballots, not entitled to compensation therefor.

2. Chairman of the Democratic Executive Committee who is running to succeed himself, is disqualified from performing duties relative to absentee ballots.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 22, 1938, which is as follows:

"Please see Acts of Extra Session of 1923, page 193.

"Under this act the Judge of Probate and the Sheriff of Washington County are both disqualified to handle absentee ballots on May 3, 1938 because they are candidates for office. I have appointed Janice W. Blount, a qualified voter of that county, to act.

"I would like to know whether or not Janice W. Blount would be entitled to pay for her services.

"John G. Kimbrough, the present Chairman of the Democratic Executive Committee of Washington County is a candidate to succeed himself. Please see Section 4 of this act. I would like to know whether or not this would be construed to be an office he is seeking and whether or not he would be disqualified. I have written him about the matter but he has not certified his disqualification."

Your first inquiry has been answered in the negative by an opinion of this office rendered to Hon. E. H. Parsons, Huntsville, Alabama, on May 22, 1934. (Opinion of Attorney General, Vol. 17, p. 199, Office Edition).

I am of the opinion that your second inquiry should be answered in the affirmative. Section 4 of Act 178, S. 27, approved April 29, 1933, (Acts 1933, p. 193) provides in part as follows:

"Section 4. In any primary election which may be held in any county in this State, in which the chairman of the executive committee of the political party holding such primary is a candidate for nomination to any office, such chairman shall be disqualified from performing any of the duties with reference to the handling of absentee ballots which are now required to be performed by him. * * *"

The question here presented is whether or not the term "any office" includes the Chairman of the County Executive Committee. We note that

this section refers to primary elections. In the primary election law of 1931 (Acts 1931, p. 73) "county office" or "county officer" shall include members of the County Executive Committees of political parties (See Section 60 (f)). Since a member of county executive committees of political parties is a "county officer" within the meaning of the Primary Act of 1931, and since Section 4 of the 1933 Act, *supra*, refers to primary elections, it is my opinion that the term "any office" as used in Section 4 of the 1933 Act, includes members of the County Executive Committees of political parties, which necessarily includes the chairman thereof. The two acts in question must be construed in *pari materia*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 31, 1938

Hon. W. P. Russell,
Custodian School Funds,
Lowndes County,
Hayneville, Alabama.

Schools—Custodian of County School Funds—

County board of education has the authority and power to remove the custodian of county school funds at will and for such reasons as to it seems fit and proper.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Under date of March 18, 1938, I received the following letter, signed J. A. Coleman, Superintendent:

"The Lowndes County Board of Education has authorized me to notify you that beginning April 1, 1938, the Lowndes County School Funds will be handled through the office of the County Superintendent of Education. As your services will no longer be needed, as of the above date, the Board request that you submit your resignation, dating it effective March 31, 1938."

"On January 29, 1936 I was elected or appointed to serve as custodian of county school funds, beginning with that date and continuing until October 1, 1940. I made bond required for my term of office and have served as custodian up to the present time.

"It is my understanding that a school treasurer or custodian can be dismissed from office only for misappropriation of funds or for legal

abuse of his office. As no such question has arisen in this case I can see no reason for my resignation.

"Even though school funds are handled through the office of the county superintendent of education some one must be placed in charge of these funds and bond made for their proper distribution.

"I will appreciate very much if you will let me have an opinion from you as to whether the above action of the Lowndes County Board of Education means my legal dismissal from office and also whether my resignation as requested is compulsory."

In my opinion, the County Board of Education of Lowndes County has plenary power to remove the custodian of school funds appointed by it at such time as it sees fit and for such reasons as to it seems proper.

The custodian of county school funds, provided by Acts of 1935, page 1090, serves in lieu of the county treasurer of school funds provided by Article XV of the School Code of 1927.

By Section 300 thereof it was specifically provided that "The county treasurer of school funds may be removed by the county board of education when, in the opinion of the said county board of education, the best interests of the school may require."

It is my judgment that the above-quoted section is still effective to empower the county board of education to remove the custodian of county school funds, although the same is strictly applicable only to the county treasurer of school funds.

But, the authority to remove is not grounded solely upon the express statutory grant.

It is a cardinal rule that the power to appoint an officer or employee and fix his term of office or employment carries with it, as a necessary incident, in the absence of constitutional or statutory restraint, the power to remove the appointee. **Touart v. State**, 173 Ala. 453, 461.

So that, even in the absence of statutory grant of the power to remove,—there being no constitutional or statutory restraint upon such removal, the county board of education has the power to remove such officer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 1, 1938.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Taxation—Sales Tax—

Licensed auctioneer selling livestock belonging to others, to the public on commission need not collect and report tax imposed by the Alabama Sales Tax Act.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry from which I quote as follows:

"Under the Gross Receipts Tax Law which was recently passed by the Legislature and approved by the Governor, there is some doubt in my mind as to the status of an auctioneer.

"A party who has procured license as an auctioneer and who sells livestock of all kinds for the public for a small commission, wishes to know if he is required to pay the State of Alabama, the 1½% Gross Receipt Tax.

"In this connection will you also advise whether this auctioneer would be liable for the collection of the 2% Sales Tax as now written and passed by the House."

A licensed auctioneer in making a sale whether of personalty or realty is by virtue of his employment primarily the agent of the seller. 6 C. J. p. 824, Section 10. *Robinson vs. Garth*, 6 Ala. 204. Under these circumstances, there is no duty upon the auctioneer at any time to collect and report the tax levied by the Alabama Sales Tax Act (Laws of 1936-37, p. 125). The tax imposed by these laws is a tax upon the seller and if, in the facts cited by you, the person who employs the auctioneer is not the producer of livestock, there would be a duty upon him to collect and report the sales tax as there would be no exemption, for subdivision (c) of Section 4, of the Alabama Sales Tax Act, supra, reads:

"Amounts received from the sale or sales of livestock, poultry and other products of the farm, dairy, grove or garden, when said sale or sales are made by the producer or members of his immediate family, or employees forming a part of the producer's organization, in the original state of condition of preparation for sale; * * *"

So that conversely if the person who employs the auctioneer to sell the livestock is the producer, there would be an exemption allowed by the above section. The auctioneer, himself, merely sells the property in accordance with the terms of what might be called his contract or agency to sell. He is bound to carry out his agency contract and unless that contract contains a provision making it his duty to collect and remit the tax then there would be no duty

on his part to do so. In order to make the auctioneer responsible for the collection and reporting of the tax imposed by the Alabama Sales Tax Act, it is my opinion the duty to do so would have to be expressed in his contract of agency, but the tax collecting authorities would not be bound by that contract.

Section 3 of the Alabama Sales Tax Act provides in part as follows:

"If any person, on or after the passage of this act shall engage in or continue in any business for which a privilege tax is imposed by Section 2 of this act, as a condition precedent to engaging or continue in such business, he shall apply for and obtain from the Commission a license to engage in and to conduct such business * * * ."

An auctioneer is not such a business as comes within the purview of Section 2 of the Alabama Sales Tax Act, as the auctioneer is at no time the seller of the article unless he personally owns the article he puts up for sale. While the objects are to be sold are in the possession of the auctioneer, he does not assume ownership but is merely a bailee. 6 C. J. p. 842, Paragraph 57.

Therefore, in my opinion, the auctioneer in your case would himself not be liable for the collection and reporting of the sales tax imposed by the Alabama Sales Tax Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1938.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Elections — Candidate for party nomination for office of County Superintendent of Education must file with Judge of Probate a certificate, signed by State Superintendent of Education that he holds a certificate of administration and supervision as required by law prescribing qualifications of a County Superintendent of Education, on or before the last qualifying date set by the party executive committee in order to have his name placed on the ballot.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 4, 1938, which is as follows:

"Will you please advise me if a person, under the provisions of SECTIONS 140 and 141 of the Alabama School Code, can have his name placed on the ballot as a candidate for the office of county superintend-

ent of education in the Democratic primary to be held May 3, 1938, if said person did not, prior to March 1, 1938, receive a superintendent's certificate, and was not certified by the state superintendent of education, to the probate judge of the county in which he wished to become a candidate, as having such certificate."

I am of the opinion that your inquiry should be answered in the negative.

Section 140 of the School Code of 1927, provides as follows:

"140. CANDIDATES FOR COUNTY SUPERINTENDENT. — Before any person shall become an applicant for employment by a County Board of Education, as County Superintendent of Education, and before any person shall qualify as a candidate for or for the nomination of a political party as a candidate for the office of County Superintendent of Education for a County in which such officer is elected by the qualified voters of the County, such person shall file with the Probate Judge a certificate signed by the State Superintendent of Education that such person holds a certificate of administration and supervision as required by the law prescribing the qualifications of a County Superintendent of Education. At the Grand Jury of the County assembled next after making of such affidavits the record of the same shall be submitted to the grand jury. In any prosecution for perjury under this Section the record of the affidavit shall be admissible in evidence."

It will be seen from the above that one of the prerequisites or conditions precedent to **qualifying as a candidate for nomination of a political party** for the office of County Superintendent of Education is that the required certificate of administration and supervision be filed with the Probate Judge. The time in which one may qualify as a candidate for nomination of a political party for any office is fixed by the executive committee of the party to be not later than March 1st next preceding the holding of the primary election. In the forthcoming Democratic Primary, the last day was fixed as March 1, 1938, in accordance with Primary Election Law of 1931, (General Acts 1931 p. 73). Therefore, if the required certificate was not filed by that date, the above prerequisites or conditions precedent to **qualifying as a candidate for nomination of a political party for the office of County Superintendent of Education** have not been met.

Section 141 of the School Code of 1927, provides as follows:

"141. BALLOT: MISDEMEANOR TO PRINT NAME OF PERSON WITHOUT CERTIFICATE ON.—Any person securing his name, or the name of another printed on a ballot as a candidate for, or nomination by a political party as a candidate for the office of County Superintendent of Education, without first there having been filed with the Probate Judge as required by law, the certificate signed by the State Superintendent of Education that the person whose name is printed on the ballot holds a certificate of administration and supervision, and any officer permitting the printing on a ballot of the name of a person as a candidate for or nomination by a political party as a candidate for the office of County Superintendent of Education where there has not been filed with the Probate Judge such certificate shall be subject to a penalty of two hundred and fifty dollars, recoverable in the name of the State for the use of any school district first instituting suit therefor. Any resi-

dent of the County may institute suit for such recovery for any school district of the County."

In view of Section 141, supra, the name of one who has not complied with Section 140, supra, as above construed, should not be placed in the ballot.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1938.

Hon. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

County Board of Health — Permit to practice midwifery limited to county where same is issued.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Section 1064 of the Code of 1923 as amended by the Legislature of 1935 (page 929, General Acts, 1935) provides that 'it shall be unlawful for any person other than a regularly licensed physician to practice as a midwife without first making written application for and receiving a permit to practice midwifery from the county board of health.'

"Each county has a board of health, acting under the supervision of the State Board of Health."

You request my opinion as follows:

Is a permit granted by a county board of health valid only in the county in which it is issued?

In my opinion your question should be answered in the affirmative. From a careful study of Section 1064 of the 1923 Code as amended, it is my opinion that it was the intention of the Legislature to restrict the practice of midwifery to the county where the permit was granted so as to secure a direct supervision over said practice by the county board of health granting said permit.

Section 1064 of the 1923 Code of Alabama, as amended, provides in part as follows:

"Section 1064. PRACTICE OF MIDWIFERY REGULATED. — (1) It shall be unlawful, for any person, other than a regularly licensed physician, to practice as a midwife without first making written application for and receiving a permit to practice midwifery from the county board of health. * * *

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute.—*Street v. Cloc*, 207 Ala. 631, 93 So. 591; *Tate v. Cody-Henderson Co.* 11 Ala. App. 350, 66 So. 837.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 7, 1938.

Hon. Matt A. Boykin,
Probate Judge,
Mobile County,
Mobile, Alabama.

Homesteads — If property, exempt as homestead from 1937 taxes, is sold for 1936 taxes, the Judge of Probate should collect only the actual taxes due for 1937, i. e., total taxes minus homestead exemption.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of February 4, 1938, which is as follows:

"On June 22, 1937, a certificate of credit on 1937 taxes, under Homestead Exemption Act No. 107, was issued in the name of Alma L. Borden by Mr. H. M. Touart, our Tax Assessor, to Mr. R. E. King, Collector. At this time the 1936 taxes on the property in question were not paid, but the land had not yet been sold for taxes. On July 20, 1937, the tax sale took place, and the property was bid in by the State for the 1936 taxes.

"Recently the aforesaid Alma L. Borden requested from us an application to redeem her property and we accordingly supplied the figures, including on the application the 1936 and 1937 taxes, based on assessments supplied by the Tax Assessor. Yesterday she submitted the application to us for redemption, tendering at the same time her credit certificate, the amount of which she demanded that we deduct from the total of the redemption.

"Under the circumstances we should appreciate your advice on the following points.

"(1) Are we authorized under the pending laws to accept Alma L. Borden's credit certificate and deduct its amount from the 1937 taxes charged on her redemption?

"(2) If the above is answered in the affirmative, will it be necessary for Mr. King, the Tax Collector, to endorse the certificate to Matt. A. Boykin, Judge of Probate?"

From the facts outlined in your letter, title to the property in question did not vest in the State of Alabama until July, 1937. If Alma Borden owned and occupied the property as a homestead on October 1, 1936, her certificate of exemption dated June 22, 1937, is valid. **Quarterly Reports of the Attorney General, Vol. IX, p. 127.**

In answer to your first inquiry, I am of the opinion that you, as Probate Judge, should collect from Mrs. Borden the original amount of the 1937 taxes less the homestead exemption credit.

Section 269 of the 1935 Revenue Code of Alabama provides in part as follows:

"(b) Upon application to the Probate Judge to redeem land, where the same has been sold to the State for taxes, which application shall be made on blank forms furnished by the State Land Commissioner, **the probate Judge shall submit such application to the Tax Assessor of the County in which the land sought to be redeemed is located and the assessor shall, without delay, enter on such application an assessment value for each of the years for which taxes are due, subsequent to the year for which such land was sold to the State for taxes, * * ***"

From the above it seems clear that when a taxpayer seeks to redeem, the tax assessor should list only the actual taxes due, i. e., the total amount minus the exemption allowed, rather than the total amount, and the Probate Judge shall collect this amount in cash.

The homestead exemption claimed by Mrs. Borden was noted on the assessment sheet of the tax assessor at the time she claimed exemption, and consequently when the tax assessor entered on the redemption form, the amount of taxes due for 1937, he should have entered the original amount less the homestead exemption.

In view of my answer to your first inquiry, an answer to your second inquiry is not necessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 25, 1938.

Mrs. Sarah E. Sossaman,
Chairman, Board of Registrars,
Mobile, County,
Mobile, Alabama.

Elections — Voters.

1. Board of Registrars should transfer names of electors from one precinct to another at any time said Board is in session, upon sufficient evidence being presented to said Board that said names should be so transferred.

2. No notice provided to be given electors whose names must be transferred by Board of Registrars from one precinct to another.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter under date of April 18, 1938, in which you request my opinion as follows:

"The Acts of 1935 p. 981 fixes the time when the Board of Registrars in County of a population of not less than 100,000 and not more than 300,000 shall sit for the purpose of registering voters and purging the registration list.

"The Acts of 1935 p. 989 provides that when the Board of Registrars have sufficient evidence furnished them that any elector has permanently moved from one precinct to another in any county, said Board of Registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved.

"It is rumored that there are several thousand voters in this county who do not reside in the ward or precinct where their names appear on the Registration list.

"1. Should these transfers be made by the Board of Registrars of Mobile County during the time fixed for purging the Registration list or during the time for Registering voters?

"The Acts are silent as to the time this should be done, and it has heretofore been the custom of the Board to transfer voters from one ward or precinct to another during the session for registering voters.

"2. Where evidence is furnished to the Board that an elector has permanently moved from one precinct to another what notice if any should be given to the elector before his name is transferred?

"If the Board is required to make transfers during the purging session it will likely consume the time of the Board and leave little time to purge the voting list."

In reply to your first inquiry, I wish to refer you to an opinion of the Attorney General addressed to Hon. Sidney J. Gray, Member, Mobile County Board of Registrars, Mobile, Alabama, under date of June 24, 1936, and reported in the Quarterly Report, opinion of the Attorney General, Vol. 3, page 197, I wish to particularly call your attention to the following paragraph found in said opinion:

"You ask specifically when the Board of Registrars may transfer the name of any elector in accordance with the mandate contained in the Acts of 1935, page 989, *supra*. In my opinion, this transfer may be made at any time the Board is in session upon the presentation of sufficient evidence in accordance with the provision of the above named act. You will note that the law specifies no certain session of the Board of Registrars at which this action must be taken."

In reply to your second question, I wish to advise you that I find no provision of law requiring notice to be given by the Board of Registrars to an elector that his name will be transferred from one precinct to another before said transfer is made by said Board.

However, a judicial determination such as this, without notice to the party affected thereby, should be avoided if possible. To this end, the practice of giving to a person whose name is to be transferred from one precinct or ward to another the same notice required by law to be given to a person whose name is to be purged from the list of qualified electors, would seem to be good practice and certainly would not be objectionable. However, as stated above, no notice is required by law to be given in such a case.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 25, 1938.

Hon. Gaston Scott, President,
State Highway Commission,
Capitol.

Highways — Highway Department—

State Highway Department has a right to enter private property for the purpose of making a preliminary survey for road construction without being liable for trespass.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion on the following:

"On Project S-24-Washington County, the Department has been making a survey for the purpose of constructing a new highway. On

reaching the property of J. F. Garriss, our Survey Party was halted and refused permission by the said Mr. Garriss to proceed with the survey on his property.

"We are anxious to proceed and have failed to obtain the necessary permission from Mr. Garriss. This refusal was in January and the survey has been held up since that time.

"Please advise what steps must be taken to secure this permission and if necessary institute the legal proceedings you may deem proper."

An answer to your question involves a discussion of the incidents to the right of eminent domain on the part of the State. The right of eminent domain is an attribute of Sovereignty and unlimited except as provided in the State or Federal Constitutions. **Denson v. Alabama Polytechnic Institute**, 220 Ala. 433. The limitations contained in the Constitution of the State of Alabama is that private property shall not be taken for public purposes without just compensation. **Section 23, Constitution.**

Further, under **Section 235 of the Constitution**, this right of eminent domain may be delegated to corporations, municipal or otherwise and to individuals.

By **Section 7016 of the Code of Alabama**, certain public utility corporations are given the right to exercise the power of eminent domain and by **Section 7027**, they are given the right to make surveys for the proposed exercise of the right of eminent domain which is a condemnation proceeding. The only limitation contained is that they shall be subject to liability for all damages done in the act of making an examination or a survey.

The right of eminent domain is an inherent right and therefore it is my opinion that the legislature in granting by **Section 7027 of the Code** the right of making examinations and surveys to public utility corporations, granted to them an incident of the right of eminent domain which the state already has, and a power which the state has a right to exercise. In considering this statute the Supreme Court said:

"It is manifest from the plain terms employed in the statute as well as from the purpose it would subserve and effect that the rights therein conferred are predicated of the sovereign power to take, to injure, or to destroy the property of others through its appropriation and devotion to a public use." **Dancy v. Alabama Power Company**, 198 Ala. 504. Cited with approval in **Birmingham Iron Company vs. Allied Engineers** 225 Ala. 522.

Further, in **Alabama Interstate Power Co. v. Mt. Vernon-Woodberrr Cotton Duck Co.**, et al, 186 Ala. 622, it was said in reference to **Section 7027 of the Code of Alabama**:

"The temporary right, and consequent limited immunity (*State v. Simons*, 145 Ala. 95, 40 South, 662), conferred by this statute, is necessarily incident to, and preliminary of authorized proceedings to condemn, instituted by the entities mentioned therein. Manifestly, the right thereby established is not conditioned—otherwise than upon an authoritative prerogative to exercise the power of eminent domain—upon any other

contingency than that the corporations mentioned shall have in contemplation proceedings to exercise the rights and powers to condemn. The obvious purpose of the statute was to allow preparatory, preliminary investigations and surveys in order to properly prepare for, and to intelligently invoke, condemnation proceedings. The right conferred is valuable and essential to the object it has in view."

An interpretation of the above cited cases gives rise to the conclusion that since the state has the power to permit public utility corporations the right to exercise this power of making a preliminary examination and survey, the State surely in its inherent power retains this right on its own behalf or by its instrumentalities. By Laws of 1935, p. 773, the State Highway Department by its employees is given the right "to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and maintain roads and bridges of this state;" So that the State Highway Department as an agency of the State has the right in my opinion to enter upon private property to make surveys or examinations for the purpose of laying out or planning contemplated highway constructions.

Further, it is my opinion that the State would not be liable for any trespass in this situation since there is an implied license in the law to commit this trespass nor would the employees of the State Highway Department be liable for a prosecution for trespass under Section 5554 of the Code of Alabama, 1923, *state v. Simons*, 145 Ala. 95.

Should Mr. J. F. Garriss continue to refuse permission to make the survey after discussing with him the opinion of this office herein, proceedings should be instituted in a court of competent jurisdiction to secure an injunction restraining Mr. Garriss from interfering with the proper work of your department in this matter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 25, 1938.

Hon. H. A. Terry,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Absentee ballots — May be tabulated by the election officials of the absentee ballot box as soon as they are received by them from the person authorized to deliver the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 11, 1938, which follows:

"There has been a common practice in this County with reference to handling the absentee ballot box. The practice referred to is that

the officials appointed to this box would meet and as soon as the polls were open they would proceed to open these envelopes which contained the absentee voter's ballot and tally the same.

"My contention is that these envelopes should not be opened or tallied until after the polls closed just as any other ballot box.

"I would appreciate your opinion at an early date on the above."

The present law of this state governing and regulating the voting, handling and tabulating of absentee ballots is Act No. 178, General Acts, 1933, page 193, approved April 19, 1933. Section 6 of this Act provides in part as follows:

"On the date of any general, special, or municipal election, as soon as the polls are open, the Judge of Probate, or person acting in his stead in the case of general or special elections, or the chairman of the political party holding the primary, or person acting in this stead in the case of primaries, or the mayor or other chief executive officer or person acting in his stead in the case of municipal elections, shall deliver all absentee ballots received to the election officers appointed under section 5 of this Act." (Emphasis ours).

while Section 5 provides:

"In addition to the managers and clerks now provided under the laws of this state for elections, there shall be, for all future elections, whether primary, general, special, or municipal, appointed at the same time and in the same manner by the appointing board of the county or city, three managers, two clerks, and a returning officer, who shall meet in the office of the Judge of Probate of the county, (or, except in the case of municipal elections, in a place to be designated by the appointing board) on the day of said election and remain, as officers at other polling places, for the purpose of receiving the ballots of absentee voters from the Judge of Probate, or other person authorized to handle them, as provided herein. The absentee ballots cast as provided by law shall be, by said election officers specified in this section, tabulated separately by precincts, and returns thereof made as now provided by the laws governing the conduct of elections. The managers, clerks, and returning officer provided for in this section shall be governed in all respects in the performance of their duties by the laws governing all elections, and shall be subject to the same penalties as other election officers. **Provided, however, that the officers appointed under the provisions of this section may begin tabulating said absentee ballots as soon as they are received by them from the person authorized to deliver same.** Provided further, that this section shall not apply to municipal elections in cities and towns whose population is less than 10,000 inhabitants." (Emphasis ours).

It is true that ballots generally cannot be counted until after the polls are closed on election day, in both general and primary elections. Section 503 of the Code of Alabama of 1923, governing the counting of votes in general elections, provided as follows:

"All inspectors of elections in the election precinct shall, immediately on the closing of the polls, count the votes polled, and no votes shall be counted until the polls are closed?";

while Section 25 of Act No. 56, General Acts, 1931, page 73, approved February 25, 1931, generally known as the 1931 Primary Law reads:

"At the close of the primary election at each polling place and nowhere else, the inspectors and clerks, shall proceed forthwith without adjournment, in the manner provided by law in the case of general elections, to count the vote.";

and Section 26 of said act provides in part:

"No ballot shall be counted until the polls are closed. * * *"

However, it is my opinion that the above quoted provisions of the 1933 Act governing absentee ballots make an exception to this rule as to the counting of ballots generally. As can be seen, the absentee ballots must be delivered to the officials of the absentee ballot box "as soon as the polls are open" and said officers "may begin tabulating said absentee ballots as soon as they are received by them from the person authorized to deliver same." These provisions are plain, clear and unambiguous. They provide an exception, in regard to the counting or tabulating of absentee ballots, as to the time when the same may be tabulated, to the law in regard to the counting or tabulating of ballots generally, as stated in Section 503, supra, for general elections and Sections 25 and 26 of the 1931 Primary Act, supra, for primary elections. Special provisions relating to specific subjects control general provisions relating to general subjects, and things specially treated will be considered as exceptions to general provisions. **Herring v. Griffin**, 211 Ala. 225, 100 So. 202. This conclusion is strengthened by the fact that the 1933 Act is the last expression of legislative will on this subject, both the provisions of the Code of Alabama of 1923 and of the 1931 Primary Act being earlier enactments. It is a well known rule that the last expression of legislative will prevails.

The premises considered, it is my opinion that the officials of the absentee ballot box may proceed, as soon as they receive the ballots from the person authorized to deliver the same to them, to tabulate said absentee ballots, and that they do not have to wait after the polls are closed to begin this tabulation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

April 25, 1938.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

County authorized to legally discharge lien, for special paving assessment on property purchased by it for bridge abutment, by payment from general fund.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request by opinion as follows:

"In 1929, the County of Elmore brought from the owner a parcel of land on the west side of the Coosa River for the abutment of the concrete bridge across said river. The bridge was constructed as per plans and the west end now rests on part of said lot. In 1926, the Town of Wetumpka pursuant to Section 2176 et seq. of the Code of 1923, paved the street in front of said lot and assessed the cost of the improvement against the property. The annual installments of the assessments had been taken care of up to the time of the purchase by the county, but the remainder of the ten annual payments have not been met. Bonds were issued by the town pledging the assessments against all property on the street in question and these matured January 1, 1936. The balance of bonds remaining unpaid were taken care of by issuance of refunding bonds and these pledged as security all unpaid assessments. Until about a year or more ago, the town had not made any formal claim against the county for the unpaid assessments against the above mentioned property. The authorities of the town are making demand on the county for the payment of these unpaid assessments against the property which the county purchased and contend that it has a lien on it under and by virtue of Sec 2199 of the Code of 1923. So far as I am able to determine and am advised, this property was subject to the lien prescribed by said code section. If the property is subject to a lien the county wants to discharge it if it can legally do so.

"Please let me have your opinion on the following questions:

"1. Assuming that the proceedings relating to the assessment constituted a lien under Code Sec. 2199, does that lien still exist where the property passed by conveyance to the county?

"2. If the first question is answered in the affirmative, can the county legally discharge the lien payment to the Town of Wetumpka?

"3. Can it be paid from the general fund?"

In my opinion, the lien for the special assessment inquired about still exists on the property conveyed to the county as detailed in your inquiry. Section 2199 of the Code of Alabama of 1923 provides in part as follows:

"2199. Fixing amount of assessment constitutes liens; superiority of such liens—At such meeting or any adjourned meeting the council shall proceed by order or resolution to fix the amount of the assessment against each lot or tract of land described and included in said assessment roll, and **all such assessments from the date of such order or resolution, shall be and constitute a lien on the respective lots or parcels of land upon which they are levied superior to all other liens, except those of the state and county for taxes. ***"**

The lien created by the foregoing section is superior to all other liens except that of the State and county for taxes. The mere fact that the county brought the property would not operate to destroy that lien, otherwise a

municipal corporation might, in a large number of cases, be deprived of the security for payment of legal assessments for public improvements and its securities made less valuable. I find no provision of law, statutory or otherwise, which renders the county's position different from that of any other purchaser buying property subject to a valid lien created by law or contract.

It is my further opinion that the county may legally discharge the lien in question by payment of the amount due to the Town of Wetumpka. While there is no contractual obligation between the town and county to pay off the lien outlined in your inquiry, the county can legally free its property of such lien by payment. **Smith v. Franklin County**, 221 Ala. 136, 127 So. 904, and cases therein cited. The question of the ultimate bearing of the burden is one to be settled between the county, as the purchaser, and the vendor of the property who conveyed such property impressed with the lien. The latter question depends for solution upon the contract between the vendor and the county at the time of sale. The town is not, so far as appears from your inquiry, concerned therewith, since it has the right to look to the property itself for the assessment.

Answering your third inquiry as to the fund from which this payment may be made, I wish to advise that such payment may be made either from the general fund (Quarterly Report of the Attorney General, Vol. 4, page 106), or from the road and bridge fund, or from the gasoline fund (Quarterly Report of the Attorney General, Vol. 2, page 82).

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 16, 1938.

Hon. John D. McQueen, Chairman,
State Democratic Executive Committee,
Tuscaloosa, Alabama.

Primary Elections—

1. If one of the two candidates for a state office receiving the highest number of votes in the first primary, in a race where there are more than two candidates and none of said candidates receives a majority of the votes cast, certifies to the Chairman of the State Democratic Executive Committee his declination to enter the second primary election, the Chairman should, upon receipt of such notification, declare the other of the two highest candidates the nominee of the party for said office and so certify his name as such nominee to the Secretary of State.

2. This procedure should be followed provided the candidate so notifies the Chairman of the State Democratic Executive Committee of his declination to be a candidate in the second primary election on any date prior to the date by which the Secretary of State must certify to the various probate judges the names of the candidates for state office to be voted on in the second primary election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 16, 1938, which follows:

"Please give me your official opinion as to my duties under the following statement of facts:

"In the Democratic Primary Election, held in this state on May 3, 1938, there were several races in which there were more than two candidates for the nomination for that particular office, and no one of said candidates received a majority of all the votes cast in said race. In two of these races, the runner-up, that is, the candidate receiving the second highest number of votes, notified me by wire yesterday, the wire being received by me today, that he did not desire to make further contest, that he declined to be a candidate in the second primary to be held on June 14, 1938, and conceded the nomination of the candidate receiving the highest number of votes for said office in the May 3rd Primary Election.

"The premises considered, should I, as Chairman of the State Democratic Executive Committee, declare the candidate receiving the highest number of votes in each of these races the nominee of the party for that office, and so certify his name as such nominee to the Secretary of State?"

Your duties in the premises are governed by the pertinent provisions of the 1931 Primary Act, which is Act No. 56, General Acts 1931, page 73, approved February 25, 1931. These provisions are found in Section 29 of said Act, which reads in part as follows:

"* * * If no candidate receive a majority of all of the votes cast in such primary election for any office or offices for the nomination to which there were more than two candidates, then there shall be held a second primary election on the second Tuesday in June next following said primary election, and the Chairman of the State Executive Committee shall certify to the Secretary of State, within three days from the date the State Executive Committee, or sub-committee thereof, canvassed the returns of the first primary election, the names of the two candidates of his party to receive the highest number of votes in the first primary election for such office, or offices, except County offices, and who are to be voted for in the second primary election, and the Chairman of each County Executive Committee shall, within three days from the date the County Executive Committee canvassed the returns of the first primary election, certify to the Probate Judge of the County the names of the two candidates who received the highest number of votes in the first primary for nomination to any County office; and the Secretary of State shall, within not more than Five days from the date he receives said certificate from the Chairman of the State Executive Committee, certify to the Probate Judge of any County where a second primary election is to be held the name or names of the candidates certified to him as herein provided by the Chairman of the State Executive Committee; and the Probate Judge of each county in Alabama shall in manner and form as required by this Act and the general laws of Alabama have prepared

and printed all election supplies and all ballots to be voted in the second primary election, which ballots shall contain, under appropriate headings or titles of the offices to be filled, the names of the two candidates for each office so certified to him by the Secretary of State and the Chairman of the County Executive Committee, as herein required, as well as such other matters as are required by this Act and the general laws of Alabama, on ballots for the first primary election. At the second primary election no one can be a candidate except the two persons who received the highest number of votes for the office for which they were candidates, in the first primary election. * * * In the event either of the two candidates receiving the highest number of votes in the first primary election shall determine not to enter the second primary election, herein provided for, he shall, as soon as possible and not less than ten days after the holding of the first primary election, certify his declination to enter such second primary election to the Chairman of the State Executive Committee of his party, if the office is an office other than a County office or to the Chairman of the County Executive Committee of his party if the office is a County office, and upon the receipt of such notification the Chairman of such Committee shall declare the other candidate the nominee of the party for said office and certify his name as such nominee to the Secretary of State or Probate Judge, as the case may require, and a second primary election for the nomination of a candidate for that particular office shall not be held, nor shall his name be printed on the ballot of the second primary election. * * * (Emphasis ours).

From the above-quoted provisions of the applicable law, it can be seen that if no candidate receives a majority of all votes cast in a primary election for any office where there are more than two candidates, the two candidates who receive the highest number of votes in the first primary automatically become the only candidates for said office in the second primary election, unless one of them declines to be a candidate. These provisions provide the manner by which the names of the two candidates receiving the highest number of votes in the first primary election shall be certified as the candidates in the second primary election, and also the method or manner by which one or the other of them may decline to become a candidate in said second primary election. It is with the provisions concerning the latter situation that we are primarily concerned. These provisions are emphasized in the above-quoted excerpt from Section 29 of said 1931 Primary Act. It will be noted that, in the event either of the two candidates receiving the highest number of votes in the first primary election, in a race where there are more than two candidates and no one of them receives a majority of all votes cast, shall determine not to enter the second primary election, "he shall, as soon as possible and not less than ten days after the holding of the first primary election, certify his declination to enter said second primary election to the Chairman of the State Executive Committee of his party," in which case the Chairman, upon receipt of such notification "shall declare the other candidate the nominee of the party for said office and certify his name as such nominee to the Secretary of State * * *, and a second primary election for the nomination of a candidate for that particular office shall not be held, nor shall his name be printed on the ballot of the second primary election." On the one hand, the law provides that such a candidate shall certify his declination to enter the second primary election "as soon as possible," and on the other hand, it provides that he shall so certify his said declination, "not less than ten days after the holding of the first primary election." These two provisions are ambiguous, conflicting, and confusing. Therefore, we must search for, and arrive at, the legislative intention, and give it effect, if at all possible to do so.

The term "not less than" has been construed literally. **Worth v. Peck**, 7 Pa. 268; **Rusch v. City of Davenport**, 6 Iowa 443; **Chambers v. Smith**, 12 Mees. & W. 2, all from Words & Phrases, 1st Series, Volume 5, pages 4833-4834. **Crawford v. School Tp. of Beaver, Dallas County**, 166 N. W. 702, Words & Phrases, 3rd Series, Volume 5, page 471. On the other hand, it has been held to mean "not more than." **Stimpson v. Pond**, 23 Fed. Cases 101.

If the clause "not less than ten days after the holding of the first primary election," is given a controlling effect, and is construed literally, such a candidate could not certify his declination to enter the second primary election until after ten days had expired from the date on which the first primary election was held, and a certification of his declination to enter the second primary election before that time would come too soon. Certainly, this would be opposed to the clause providing that he certify such declination "as soon as possible."

On the other hand, if it is given a controlling effect and construed to mean "not more than", then such a candidate would have to certify his declination to enter the second primary election on the day following the date on which the state committee receives the returns of the first primary election, canvasses, tabulates and publicly declares the results, which is the second Thursday next following the date of the holding of the first primary election. Section 29, *supra*. This would give such a candidate very little time, after he knew the official result of the first primary election, to determine the course which he desired to follow.

The primary and fundamental rule of statutory construction, to which all other rules are, and must be, subordinated, is to ascertain and give effect to the intention of the Legislature as expressed in the statute. **Street v. Cloe**, 207 Ala. 631, and numerous cases cited and collated in 18 Ala. Dig., Statutes, 181.

In seeking this intention, a statute must be construed as a whole, and the intention of the whole Act will control the interpretation of the parts. **Patterson v. State**, 16 Ala. App. 483.

To harmonize seeming conflicts in the statutes, the less certain must yield to the more certain terms of the statute. **Marengo County v. Wilcox County**, 215 Ala. 640.

Whether the provisions of an act are directory or mandatory must be determined by consideration of the subject matter and the relations of each provision to the general subject, so as to arrive at the true legislative intent. **Citizen's Bank and Security Company v. Commissioners' Court of DeKalb County**, 209 Ala. 646.

In determining whether the provisions of a statute is directory or mandatory, the primary object is to ascertain the legislative intention disclosed by the statute, in relation to its subject and purpose. **Board of Education of Jefferson County v. State** 222 Ala. 70.

When these rules of construction are applied to the above quoted provisions of the 1931 Primary Law, which govern your duties in the premises, it is my opinion that the clause "as soon as possible" should be given a controlling effect over the ambiguous and conflicting and uncertain clause "not

less than ten days after the holding of the first primary election." The purpose of all of the pertinent provisions of the Act is to insure the nomination of candidates of the party by a majority of the voters thereof, in all cases where primary elections are held, but at the same time to make it possible for one of the two candidates receiving the highest number of votes, in a race where there are more than two candidates and no candidate receives a majority of the votes cast for that office to withdraw from the contest, if in his unbridled discretion he deems such a course to be for his best interests, or the best interests of the party, the State, or for any reason whatsoever. To this end, the machinery for such a candidate to make known his intentions is provided. In my judgment, it was the intention of the Legislature in providing this machinery that such a candidate who did not desire to enter a second primary election should so make known to the people of the State at the earliest possible moment after he arrived at such decision, to the end that the other candidate might be declared the nominee, and the necessity of the expense of the second primary election might be obviated, together with all the other liabilities attendant thereupon, in which event no second primary election for that office is held. This intention is accomplished if such a candidate certifies his declination to the chairman of the party committee and the Chairman in turn certifies the name of the other candidate as the nominee of the party for that office to the Secretary of State, at any time before the last date on which the Secretary of State must certify to the various probate judges the names of those candidates to be voted on in the second primary election.

In my opinion, this construction gives effect to the intention of the Legislature in enacting the above-quoted provisions of law, and consequently, I hold that if one of the two candidates receiving the highest number of votes for an office, in a race where there are more than two candidates and no candidate receives a majority, decides not to enter the second primary election, that he should notify the Chairman of his party committee of said declination at the earliest possible moment after he makes his decision, and that in such a case, if the Chairman receives the notice at any time before the last date on which the Secretary of State must certify to the various probate judges the names of the candidates to be voted on in the second primary election, then the Chairman should certify the name of the other candidate to the Secretary of State as the nominee of the party for said office, and no second primary election should be held for said office, and the name of no candidates for said office should appear on the ballot in the second primary election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 23, 1938.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Filing tax—

1. Oil and gas leases subject to filing tax.

2. The deed tax in such cases is measured by the reasonable cash value of the property or interest in the property conveyed by the deed filed for record.

3. Determination of the amount to be paid on such instrument offered for recording is left to the probate judge.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of April 29, 1938, in which you request my opinion as follows:

"A short time ago there was filed with me for record a number of oil and gas leases by which instruments the owners of the land granted to the lessees named Spearman and Robinson, respectively, the privilege of mining and operating on the lands described for oil and gas and laying pipe lines and erecting the necessary buildings and structures for saving and treating the product extracted. The expressed consideration in each of these instruments was one dollar, but there are additional clauses, that if the lessees do not commence a well on the lands within one year from the date of the lease then the lease shall terminate, unless the lessees shall on or before the expiration of said one year pay the lessor an amount specified which is at the rate of \$0.10 per acre of the land leased. Such payment extending the time for commencing a well another year and with privilege of renewal on like payment.

"If a productive well results, the lessor is to have one-eighth of oil and royalty. If only gas is found, \$200.00 per well per year. I have just received for record another instrument by which the original lessees assign and convey all their rights, title, interest and privileges to sub-lessees. (The latter being the one who offer the instrument for record). In a number of the leases, not all of them, the sub-lessees being under the same obligations as their grantor.

"I wish your instructions or opinion on what basis or by what method shall I determine the amount of deed record privilege tax, if any, to be collected on the recording of this instrument. It seems obvious that no absolute valuation is fixed, either by this instrument or by the original lease instruments, because so much depends on whether the lessees commence operations at all and whether such operations produce either oil or gas or possibly produce nothing. Will you please give me your opinion so that it may be received by me not later than Monday of next week."

This office has previously held that leases similar to the one mentioned by you are subject to the payment of the recording tax. See 1926-28 Biennial Report of the Attorney General, page 621; 1928-30 Biennial Report of the Attorney General page 683.

It has also been held by this department that "the deed filing tax is measured by the reasonable cash value of the property, or interest in property, conveyed by the deed filed for record." (Opinions cited supra).

The rule of determining the amount of tax to be used on an instrument left with the probate judge to be recorded is set forth by the Supreme Court of Alabama in the case of **Long v. Jasper Land Company**, 217 Ala. 593, 117 So 210. The rule, as stated in that opinion in paragraph 2, is as follows:

"The determination of the amount of tax to be paid on an instrument is left to the probate judge. In accord with the general rule that fraud and misrepresentation are not to be presumed, we are of the opinion that the probate judge may accept as prima facie correct the recitals of the deed that it was 'executed for a normal consideration for the purpose of perfecting the title to real estate'; and may act accordingly, in the absence of any fact or circumstances to the contrary, coming to his attention calculated to put on notice a reasonably prudent person. Should it develop subsequent to the recordation of the deed that the recitals of the deed were misleading and untrue, the judge of probate, acting in good faith as above indicated, would find protection, though, under the language of the act, there may be a collection of the correct amount of tax due subsequent to the recordation of the deed."

The above holding was followed in the case of **Thompson v. Smith**, 174 So. 796, in paragraph 1.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

May 24, 1938.

Hon. L. C. Garrison,
Judge of Probate,
Walker County,
Jasper, Alabama.

Corporations — Benevolent corporation, not organized for business or profit, under Section 7046, pays to Probate Judge filing and recording fee of \$2.00 and \$1.00 for issuing a charter.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letters of recent date, together with a copy of the Constitution and Bylaws of the Alabama Old Age Benevolent Association, as to which you request my opinion as follows:

"There has been filed in this office for recording, the Declaration of Incorporation of the Alabama Old Age Benevolent Association, the intents and purposes of which are too lengthy to include in this letter, but for your complete information a complete copy of the paper is enclosed.

"An opinion from you at your early convenience, showing the amount of filing fees, other than the recording fee, if in your opinion any are due or not due, is very much desired."

Upon examination of the certificate of incorporation and constitution and bylaws which you supplied me, stating that this corporation is organized for the advancement of the social, economic and financial well-being of its members, and for the cooperation of, and with, other organizations whose purposes are for the uplift and general welfare of humanity; and from the further fact that active members of this association must be over the age of sixty years, it is my conclusion, pursuant to the reasoning in the case of **Fairhope Single Tax Corporation v. Melville**, 193 Ala. 289, that the Alabama Old Age Benevolent Association is attempting to organize under the authority granted in Article IX, Section 7046, Code of Alabama 1928, Michie.

The proper fee to be charged by your office for filing and recording the certificate of incorporation is \$2.00 and \$1.00 for issuing the charter to the said corporation under Section 7285, Code of Alabama.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

May 25, 1938

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Attention of Mr. Harry Simon, Chief Clerk,
Privilege License Department.

Corporations—Mutual Cooperative and Marketing Corporations—

1. Associations organized under the authority of General Acts, 1935, p. 604, are not authorized to engage in the business of selling merchandise not essential to the production, processing, packing or sale of agricultural products.

2. Such an association is not authorized to engage in the sale of commodities such as tobacco (not raised or produced by its members) and soft drinks and would be subject to the payment of a privilege license to the state and county for the sale of these commodities.

3. Such an association would have authority to sell automobile accessories to be used on farm implements or trucks as being essential to the production, processing, packing or sale of agricultural products and therefore would be exempt from the payment of state and county privilege license.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Under the provisions of Act No. 220, p. 604, General Acts of 1935, authority is granted for the incorporation of mutual co-operative marketing and purchasing corporations of agricultural products, and to grant to such associations certain exemptions from ad valorem taxes and privilege licenses.

"1. Under the provisions of this Act, would you hold that such an association or corporation organized under the authority of Act No. 220, supra, be authorized to engage in the business of selling merchandise that was not essential to the production, processing, packing, or sale of agricultural products?

"2. Would such an association organized under the provisions of the aforesaid Act have authority to engage in the sale of such commodities as tobacco (not raised or produced by its members), soft drinks, automobile accessories or other merchandise not the products of the farm?

"3. If you hold that such association may engage in the buying and selling of commodities mentioned in the above paragraph, would such association be exempt from the payment of the privilege license to the State and county for the sale of tobacco, soft drinks and automobile accessories?"

1. Your first question should be answered in the negative. Pursuant to Section 9 of the General Acts 1935, page 607, an association organized under the provisions of this act is given power to generally engaged in any business **necessary or useful in the production of agricultural products**. Section 9 mentions some of the articles that are necessary or useful in the production of agricultural products, but the emphasized words are words of limitation. So that in my opinion, an association organized under the authority granted in this law would not be authorized to engage in the business of selling merchandise that was not essential to the production, processing, packing or sale of agricultural products, in other words such acts would be "ultra vires" of the association.

2. Your second question should be answered in the negative with one exception. Where an association is organized under the authority of this act and engaged in the sale of commodities such as tobacco, soft drinks or other merchandise not the products of the farm, it is exceeding the powers granted to it by Section 9 of this act. Since the purpose of the law was to provide for cooperative marketing and purchasing of agricultural products or articles necessary in the production of agricultural products, by no stretch of the imagination could tobacco and soft drinks come under this classification. In reference to automobile accessories where these accessories are to be used on farm implements such as tractors, etc., and on commercial vehicles used in hauling farm products to markets and in bringing to the farm seed, fertilizer etc., it is my opinion that these accessories would come under the classification.

"Any other goods, wares or merchandise necessary or useful in the production, processing, packing, storage, distribution and marketing of agricultural products * * *".

contained in Section 9 supra. Naturally, automobile accessories to be used in private passenger automobiles could not be included herein.

3. Such an association would not be exempt from the payment of the privilege license to the state and county for the sale of tobacco and soft drinks. By using the same reasoning as set forth above, it is my opinion automobile accessories as so limited would be exempt, as Section 15 of General Acts, 1935, page 604, provides in part as follows:

" * * * and all goods and articles purchased or acquired by such corporation, whether in or out of the state, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this state, shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this state."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 1, 1938.

Hon. Howell Turner,
Secretary of State,
Capitol.

Registrars — Board of Registrars in counties coming within the terms of Act No. 155, General Acts 1936, page 174, approved April 21, 1936, must meet each year on the first Monday in July and remain in session five days, in accordance with the terms of said act, notwithstanding the fact that the first Monday in July of a particular year be a legal holiday.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 9, 1938, which follows:

"Act No. 155 of the 1936 Acts, found on page 174, provides for the Boards of Registrars in certain counties meeting for five days beginning on the first Monday in July for the purpose of registering voters. This year the 4th of July, a legal holiday, falls on the first Monday in July. Please advise if the Boards of Registrars should, in view of these circumstances, meet on Tuesday, July 5th, and continue through Saturday, or should they meet on Monday, July 4th, which is a legal holiday."

Section 9215 of the Code of Alabama, 1923, reads as follows:

"HOLIDAYS; PAPER DUE ON; DUE NEXT SUCCEEDING BUSINESS DAY.—Sunday, Christmas day, the first day of January, Robert E. Lee's birthday, the nineteenth day of January; the twenty-second day of February, Thomas Jefferson's birthday, April the thirteenth; Mardi Gras, the twenty-sixth day of April, Jefferson Davis' birthday, the third day of June; the fourth day of July, the first Monday in September, Fraternal day, the second Tuesday in October, Armistice day, the eleventh day of November, and the day designated by the governor for public thanksgiving, shall each be deemed a holiday. If Christmas day, or the first day of January, or the nineteenth day of January, or the twenty-second day of February, or the thirteenth day of April, or the twenty-sixth day of April or the third day of June, or the fourth of July, or the eleventh day of November, falls on Sunday, the Monday following is the holiday. If any paper entitled to days of grace, by the allowance thereof, or subject to protest, becomes due on a holiday, it must be taken as due on the next succeeding business day."

This section was amended by a 1933 Act in respects not here material. Thus, the Fourth of July is a legal holiday.

Nevertheless, it is my opinion that Boards of Registrars should hold meetings in accordance with the terms of Act No. 155, General Acts 1936, page 174, approved April 21, 1936, each year for a period of five days, beginning on the first Monday in July even though the first Monday in July of a particular year may be the Fourth of July and consequently a legal holiday.

Speaking to the general question of the effect of legal holidays on official acts, the particular official act there under consideration being a judicial proceedings, the late and lamented Mr. Justice Stone of the Supreme Court of Alabama spoke as follows, in the case of **Belmont Coal & Railroad Company v. Smith**, 74 Ala. 206, at page 213:

"There is nothing in the argument that Thanksgiving day is dies non juridicus. It was made a legal holiday for commercial purposes. * * * This does not interdict worldly labor or secular pursuits on that day."

This office, in an opinion to Hon. H. W. Clayton, Clerk, Circuit Court, Marshall County, Guntersville, Alabama, under date of March 11, 1935, Office Edition, Vol. 3A, page 5, held that it was optional with each individual as to whether or not he would observe legal holidays, other than Sunday, which he must observe.

Therefore, an official act can be performed on a legal holiday. Since, under the provisions of the above-quoted act of 1936, Boards of Registrars in the counties coming within the terms of said act are required to meet for a certain period beginning on the first Monday of July of each year, and especially in view of the fact that this said act is a later expression of legislative will than the Code section designating, among other days, the Fourth of July as a legal holiday, it is my opinion that these meetings should be held each year in accordance with the terms of said act, for a period of five days, beginning on the first Monday in July, notwithstanding the

fact that the first Monday of July of a particular year may come on the Fourth of July, which is a legal holiday. Since the opinion of this office cited herein has not been published in our reports, a copy of the same is enclosed herewith for your information.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 2, 1938.

Hon. Woolsey Finnell,
Tax Collector,
Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation — Taxes assessed to life tenant — Section 241 — Revenue Act. (General Acts of 1935, p. 256).

1. Taxes assessed to a life tenant who died, and owned no personal property or other assets out of which taxes could be collected, should be returned on the "list of insolvents." Section 178, General Acts, 1935, p. 256.

2. The death of life tenant of real property in December, 1937, does not subject fee of remainderman or reversioner to taxes assessable October 1, 1937.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of February 3, 1938, as follows:

"I wish your opinion to guide me in handling the matter of taxes assessed against real estate owned by a life tenant who died after the beginning of the tax year.

"On July 27, 1932, Honorable Thomas E. Knight, Jr., Attorney General, wrote Judge W. W. Brandon, Probate Judge of Tuscaloosa County, Alabama, an opinion that

"The sale, for the payment of taxes of real estate assessed to a life tenant thereof, does not, in any way, affect any right, title or interest of the reversioner or remainderman, whether bought by an individual or the State."

"I am informed that W. J. Barnes of Tuscaloosa owned a life estate in Lots 1 and 2 of Block 1 of Tuscaloosa and Castle Hill Real Estate & Manufacturing Company Survey. He acquired this life estate by

the right of courtesy from his deceased wife, who died without a will some years ago and who was the owner of this property. W. J. Barnes died during December, 1937, and this property was assessed to Mr. Barnes for 1937 and also for 1938, the 1938 tax year having begun October 1, 1937, prior to Mr. Barnes' death in December, 1937.

"Since Mr. Barnes has already died and since no tax title based on his ownership would pass any title to the remainder interest in this property, which now constitutes the full title after Mr. Barnes' death. I see no reason to sell this property at tax sale for 1937 taxes, as Mr. Barnes former life tenant to whom this property was assessed for 1937 died in December, 1937.

"Please advise me my duties concerning 1937 taxes on this property, since Mr. Barnes left no personal property, and should the 1937 taxes be charged off or abandoned as uncollectable?

"Also, what should be done about the 1938 taxes which became a lien on the property several months before the death of the life tenant, W. J. Barnes, and should 1938 taxes be charged off as uncollectable?

"It appears that to sell Mr. Barnes' interest is all that could be done, and since his interest terminated with his death in December, 1937, it seems that it would be unnecessary and useless trouble and expense and confusion to undertake to make any sale on account of 1937 or 1938 taxes, since under Mr. Knight's opinion above referred to and the cases therein cited, it appears that no valid or effective sale could now be had for the tax year 1937 or 1938.

"Awaiting your opinion and instructions about this matter, I am—"

It is my opinion that the taxes which were assessed to the life tenant as mentioned in your letter should be returned on the "list of insolvents" (Section 178, Gen. Acts, 1935, p. 256), provided there is no other property belonging to the estate out of which these taxes can be collected. The interest of the reversioner or remainderman is not subject to the taxes which were assessed against the life estate of the life tenant who died in December, 1937. Section 241, Revenue Act, General Acts of 1935, p. 256, provides that the deed of the Probate Judge, conveying property was sold for the payment of taxes, "Shall not convey the right, title, or interest of any reversioner or remainderman therein." In the absence of personal property upon which a lien attaches for the payment of the taxes, or if there are no other assets belonging to the estate of decedent out of which the taxes could be collected, the interest of the life tenant having terminated, it is my opinion that the taxes should be listed as above stated.

With reference to the fee of reversioner or remainderman being taxable for 1937-38 taxes, it is my opinion that said interest is governed by the status of the property on October 1, 1937. This reversionary interest was not taxable on that date. The interest of the reversioner or remainderman ripened into absolute title after October 1, 1937, at the death of the life

tenant, and for that reason, such fee is not taxable as of October 1, 1937. Section 31, Revenue Act; General Acts of 1935, p. 256, provides as follows:

"Section 31. It is the duty of every person in every election precinct to attend in person before the Assessor on the first day of the appointment in the precinct of the taxpayer's residence, and then and there render to the Assessor under oath a full and complete list of all property of which he was owner, or in which he had any interest whatever, or of which he was trustee or agent **on the first day of October of that year**, and to enter upon such paper the amount of fire insurance carried upon any of the property so listed."

It appears from your statement of facts that the reversioner or remainderman did not own a taxable interest on October 1, 1937, and for that reason no taxes can lawfully be levied on said property for the tax year 1937-38.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

County Courts—Costs and fees are governed by first portion of Section 3758 of the Code of Alabama, 1923. The last three paragraphs contained in said section have no field of operation and should be disregarded.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 30, 1938, which is as follows:

"Please refer to Section 3758, Code of 1923, pertaining to Fees in Prosecutions before the County Court, which Section quoted *supra* provides in part as follows:

'For trial, entering judgment and when an appeal is taken, approving bond and certifying proceedings.....\$5.00.'

'If the Warrant of Arrest is not issued by him, then for all services in each case.....\$3.00.'

"The above provisions being in apparent conflict, please advise what fee should be charged for services rendered by the Judge of the County Court as indicated by the above quoted provisions of law."

In answer to your inquiry, I am of the opinion that the proper fees chargeable are those set out in the Schedule of fees in the first portion of Section 3758 of the Code of Alabama, 1923. The last three paragraphs of said section have no field of operation and therefore should be treated as surplusage and disregarded.

The Code section under consideration seems on its face to present an apparent conflict. Therefore, it is necessary to review the legislative history of said section to ascertain the true legislative intent. In dealing with the fees of the county courts, the Code of Alabama of 1907 provided as follows:

Section 6655. **FEEES IN COUNTY COURT.**—In prosecutions before the county court, the following fees shall be allowed for the services specified, and none other—that is to say:

"For taking affidavit of complainant and issuing warrant of arrest	\$1.00
"For taking and approving bail bond.....	50
"For issuing each subpoena or notice	25
"For each order of continuance	50
"For trial, entering judgment, and, when an appeal is taken, approving bond and certifying proceedings	5.00
"For judgment on forfeited undertaking of bail.....	3.00
"For judgment against defaulting witness.....	2.00
"For serving warrant of arrest when bail is given	1.00
"For serving warrant of arrest when bail is not given, and carrying defendant to court or to jail.....	2.00
"For serving each subpoena or notice.....	50

"The fees above specified shall be taxed against the defendant on conviction, or against the prosecutor under the provisions of section 6722 (4619), and if not paid presently, may be collected by execution; but no fee shall be taxed for services not rendered.

"The fees taxed for services performed by the county court, or by the judge of said court, belong to the county, and, when collected, shall be paid into the county treasury; and the fees taxed for all other services shall be paid to the officers by whom the services are performed."

"Section 6656: **SAME: FEES OF JUDGES TO BE PAID OUT OF COUNTY TREASURY.**—The judge of the county court shall receive no other compensation than the following fees, which shall be paid out of the county treasury—that is to say:

"If the warrant of arrest is issued by him, then for all the proceedings had before him in each case, including bond and certified copy of proceedings on appeal..... \$4.00

"If the warrant of arrest is not issued by him, then for all services in each case 3.00

"If the warrant is issued by him and a demand for jury is made 2.00

"For each judgment against a defaulting witness, or on forfeited undertaking of bail..... 2.00"

It will be seen from the above that Section 6655 provided a schedule of fees chargeable in the county court, of the amounts collected under Section 6655. The amounts set out in Section 6656 were the personal fees or compensation of the judge of the county court, who was at that time on a fee basis. Both sections had a field of operation.

The legislature in its 1919 session enacted Act No. 707, S. 549, approved September 29, 1919 (General Acts, 1919, p. 1030, which act is as follows:

"That in prosecutions before the county court the following fees shall be allowed for the services specified, that is to say: where the services are performed by the judge of the county court the following fees shall be taxed: For taking affidavit of complaint and issuing warrant of arrest \$1.00. For issuing each subpoena or notice .25. For each order of continuance .50. For trial, entering judgment and when an appeal is taken, approving bond and certifying proceedings \$5.00. For judgment on forfeited undertaking of bail \$3.00. For judgment against defaulting witness \$2.00. The sheriff shall receive the same fees as are allowed by law to him for similar services performed in the Circuit Court including guard fees where defendants are confined in jail. The Clerks of the Circuit Court who by law shall be made ex-officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the Circuit Court. Witnesses shall receive the same pay and allowance for mileage as in the Circuit Court. Solicitors fees shall be the same as for similar services rendered in the Circuit Court. The fees above specified shall be taxed against the defendant on conviction or against the prosecutor under the provision of Section 6722 of the Code, and if not paid presently, may be collected by execution. The fees taxed for services performed by the judge of the county court belong to the county and fees for services of solicitors belong to the county, and shall be paid, when collected, into the county treasury; fees of witnesses and fees taxed for services of other officers shall be paid to the witnesses and to the officers by whom the services are performed. The fees of witnesses, clerks and sheriffs in all cases where no conviction is had shall be governed by the provisions of law applying to similar services in the Circuit Court or in preliminary proceedings.

" 2. This Act shall not repeal an Act entitled "An Act to require all the fees collected by Sections 6655 and 6656 of the Code, in the county court to be paid into the county treasury; to provide a fund out of which the salaries of the judges of the county court shall be paid, and to fix the amount of such salaries," approved September 18, 1915; and shall not repeal any act, local, general or special, passed by the Legislature of 1919 to fix the salary of the judge of the county court. All other laws or parts of laws in conflict herewith are hereby expressly repealed."

Approved September 29, 1919."

The Act of 1915 approved September 18, 1915, referred to in the 1919 Act, supra, provided that all fees collected by the judge of the county court be paid into the county treasury and provided a schedule of salaries varying with county population in lieu of fees. Section 2 of the 1915 Act with slight revisions was carried forward in the 1923 Code as Section 3802.

The 1915 Act, supra, has the effect of repealing Section 6656 of the Code of 1907, supra, in that the fees collectible were to be paid into the county treasury and the judges of the county court given a salary compensation in lieu thereof. This fact was recognized in the 1919 Act, supra.

Section 3728 of the Code of 1923 adopted the 1919 Act, supra, together with part of Section 6656 of the Code of 1907. Said Section 3758 is as follows:

"Section 3758—FEES IN COUNTY COURT.—In prosecutions before the county court the following fees shall be allowed for the services specified that is to say: Where the services are performed by the judge of the County Court the following fees shall be taxed:

"For taking affidavit of complaint and issuing warrant of arrest	\$1.00
"For issuing each subpoena or notice	.25
"For each order of continuance	.50
"For trial, entering judgment and when an appeal is taken approving bond and certifying proceedings	5.00
"For judgment on forfeited undertaking of bail	3.00
"For judgment against defaulting witness	2.00
"For each day's attendance by the sheriff, on such court	2.00

"The sheriff shall receive the same fees as are allowed by law to him for similar services performed in the circuit court, including guard fees where defendants are confined in jail. The clerks of the circuit court who by law shall be made ex-officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the circuit court. Witnesses shall receive the same pay and allowance for mileage as in the circuit court. Solicitors' fees shall be the same as for similar services rendered in the circuit court. The fees above specified shall be taxed against the defendant on conviction or against the prosecutor under the provision of section 3833 (6722) of the Code, and if not paid presently, may be collected by execution. The fees taxed for services performed by the judge of the county court belong to the county, and fees for services of solicitors belong to the county and shall be paid, when collected, into the county treasury; fees of witnesses and fees taxed for services of other officers shall be paid to the witnesses and to the officers by whom the services are performed. The fees of witnesses, clerks and sheriffs in all cases where no conviction is had shall be governed by the provisions of law applying to similar services in the circuit court or in preliminary proceedings.

"If the warrant of arrest is issued by him, then for all the proceedings had before him in each case, including bond and certified copy of proceedings on appeal

\$4.00

"If the warrant of arrest is not issued by him, then for all services in each case 3.00

"For each judgment against a defaulting witness, or on forfeited undertaking of bail 2.00"

This consolidation seems on its face to present an apparent conflict. However, the legislative history above outlined shows a repeal of Section 6656 of the Code of 1907, *supra*. It is true that said Section 6656 of the Code of 1907 could have been readopted by incorporation into the Code of 1923, but surely this was not the legislative intent. If it had been intended to readopt Section 6656 of the Code of 1907, *supra*, and give the judge of the county court personal fees, the 1915 act, *supra*, would not have been carried forward in substance as Section 3802 in the Code of 1923, *supra*. In other words, that part of Section 6656 of the Code of 1907, *supra*, which is the last three paragraphs of Section 3758 of the Code of 1923, *supra*, is without a field of operation. As the judge of a county court is on a salary and not a fee basis, the fees attempted to be allowed him in the last three paragraphs of Section 3758 of the Code of 1923, *supra*, which were formerly allowed him under Section 6656 of the Code of 1907, *supra*, are inapplicable.

The premises considered, it is my opinion that Section 3758 of the Code of 1923, *supra*, with the exception of the last three paragraphs thereof, governs the fees chargeable in a county court. The last three paragraphs thereof, which were part of Section 6656 of the Code of 1907, *supra*, have no field of operation and should be treated as surplusage and disregarded.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Cost of transporting insane prisoner when imprisoned for any of the causes set out in Section 4577, Code of Alabama 1923, must be paid by the State of Alabama.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of May 18, 1938 which is as follows:

"Walter H. Roy, a resident of Autauga County was apprehended within the confines of Elmore County charged with a crime in Elmore County. Later while in Jail a physician made proper certificate that this defendant was insane.

"Please advise me whether or not Elmore County could properly pay for the transportation of this patient to Bryce Hospital in Tuscaloosa or whether he should be turned over the authorities of Autauga County, in which he has his residence."

You do not state in your letter for what kind of commitment the prisoner was confined in the jail of Elmore County, but assuming that it was for one of the reasons set out in Section 4577, Code of Alabama 1923, I am of the opinion that the costs incurred in transporting this prisoner from Elmore County to Tuscaloosa County must be borne by the State of Alabama and collected therefrom as in the case of removal of prisoners from one county to another.

Sections 4577 and 4580 are as follows:

"4577. Inquisition upon alleged insane prisoner; further proceedings.—If any person in confinement, under indictment, or for want of bail for good behavior, or for keeping the peace, or appearing as a witness, or in consequence of any summary conviction, or by an order of any justice, appears to be insane, the judge of any court of record of the county where he is confined must institute a careful investigation, call a respectable physician and other creditable witnesses, and, if he deems it necessary, may call a jury, and for that purpose he is empowered to compel attendance of witnesses and jurors; and if it be satisfactorily proved that the person is insane, the judge may discharge him from imprisonment and order his safe custody and removal to the hospital, where he must remain until restored to his right mind; and then, if the judge shall have so directed, the superintendent must inform the judge and sheriff, whereupon the person must be remanded to prison, and criminal proceedings be resumed, or he be otherwise discharged.

"4580. Expenses to be paid by the state; when and how state reimbursed.—The cost of removing an insane prisoner to and from the hospital under any of the provisions of this chapter must be defrayed by the state as in case of removal of prisoners from one county to another; and such cost, together with the expenses of such patient in the hospital, may be recovered by the state from such person, or his estate, or any relative who would have been bound to provide for and maintain him elsewhere."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. A. H. Collins,
Superintendent of Education,
Montgomery, Alabama.

June 14, 1938.

School Funds—Under Act No. 204, H. 584, approved July 11, 1935,
(General Acts 1935, p. 596) Montgomery County Board of Educa-

tion has authority to spend school funds for paying the fee of \$10.00 per high school for membership in Southern Association of Colleges and Secondary Schools, and for providing professional educational magazines for school libraries.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you state:

"On December 17, 1934, the Attorney General's office rendered an opinion to Mr. Raymond E. Thomason, Member of the Jefferson County Board of Education, Birmingham, Alabama, in which it was held that the county board of education did not have the authority to pay the membership fee of high schools in the Southern Association of Colleges and Secondary Schools. Reference was made in that opinion to the fact that the Attorney General's office had previously held on May 20, 1929, that school funds could not be used for paying membership dues in the Alabama Education Association and to pay subscriptions to educational publications.

"Attention is called to Act No. 204, approved July 11, 1934. That act applies specifically to the Montgomery County Board of Education. In Section 1 of this act is contained the following statement: 'And the Board shall be authorized to use all monies received by said Board for any and all school purposes.' "

You request my opinion as follows:

"1. Does the Montgomery County Board of Education have the authority to spend school funds for the purpose of paying the fee of \$10 per high school for membership in the Southern Association of Colleges and Secondary Schools?

"2. Does the Montgomery County Board of Education have the authority to spend school funds for the purpose of purchasing professional educational magazines for school libraries?"

In my opinion your questions should be answered in the affirmative.

Act No. 204, H. 584, approved July 11, 1935, (General Acts, 1935, p. 596) provides in part as follows:

"* * * And the Board shall be authorized to use all monies received by said Board for any and all school purposes. * * *" (Italics supplied).

In the case of *Peter v. Kaufman*, 38 S. W. (2nd), p. 1062, the Supreme Court of Missouri in 1931, held that the term "school purposes" in a constitutional provision limiting the rates of taxation covered all the usual and ordinary expenses of maintaining and operating schools.

In my opinion the "usual and ordinary expenses of maintaining and operating schools," means the usual and ordinary expenses of maintaining and operating schools in an efficient manner and according to existing standards.

For the high schools to be members of the Southern Association of Colleges and Secondary Schools would certainly increase the efficiency of the teaching personnel and the standard of the school system.

The addition of professional educational magazines to the school libraries, would make the libraries more useful to the pupils as well as the teachers.

It is, therefore, my opinion that the Montgomery County Board of Education may spend school funds for paying the fee of \$10.00 per high school for membership in the Southern Association of Colleges and Secondary Schools, and for purchasing professional educational magazines for school libraries, as such expenditures would be for school purposes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. A. H. Collins, Superintendent,
State Department of Education,
Montgomery, Alabama.

Schools — County Board of Education or City Board of Education has authority to employ professional assistance in making up curriculum.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of February 28, 1938, which is as follows:

"County and city boards of education throughout the State of Alabama in cooperation with the State Department of Education are undertaking a study of the curricula now being offered in the public schools of the State. This study involves an analysis of the present offering, experimentation to determine the validity of new proposals, the reorganization of courses of study, and many other professional and technical procedures. The personnel of the State Department of Education is limited. Therefore, the various school systems of the State have found it necessary to call upon the several institutions of higher learning for professional assistance. No special appropriation is made to the institutions of higher learning to render this service. Therefore, county boards of education are required to pay the institutions of higher learning for

the services of curriculum consultants, if those services are secured. The improvement of the curricula of the public schools benefits all of the children of the State. It definitely promotes the equalization of educational opportunity. Therefore, I am asking your opinion concerning the following:

"Is it legal for county and city boards of education to pay for the services of curriculum consultants employed for the purpose of improving the offerings of the public schools?"

In reply to your inquiry, I am of the opinion that a County Board of Education or City Board of Education has authority to employ curriculum consultants for the purpose of improving the offerings of its public schools.

I refer you to an opinion of this office written by the Attorney General (Quarterly Report, Vol. IX, p. 57) wherein it was held that the County Board of Education of Jefferson County has authority to pay the traveling expenses of teachers sent to Peabody College to obtain instruction in improving the curriculum of the county schools. Said opinion states in pertinent part as follows:

"* * * it is my judgment that the County Board of Education of Jefferson County is authorized to pay the actual and necessary expenses incurred by teachers in improving the curriculum of the Jefferson County Schools, and that such expenses may be paid from the proceeds of the three-mill county-wide tax, which tax is voted for public school purposes."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. C. H. Keller,
Register, Circuit Court,
Cullman County,
Cullman, Alabama.

Witnesses who appear in equity case and testify before a commissioner who is authorized to take testimony, are entitled to their pay on the certificate of the commissioner that they appeared and testified. This is true whether they appear voluntarily or by subpoena from the commissioner.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 25, 1938, in which you request my opinion as follows:

"1. In Chancery cases where the testimony of the witnesses is taken before a commissioner appointed by the Court, and the witness does not prove his attendance within five days after the trial of the case, but the commissioner certifies that such witness is entitled to a certain witness fee, in such case, should witness fees of this nature be charged as a part of the cost in the case

"2. In Chancery cases where a witness appears voluntarily without subpoena before a commissioner appointed by the Court and testifies at the trial of the case, and the commissioner certifies a witness fee, is such witness entitled to the witness fee?

"3. In Chancery cases where a witness appears voluntarily before the Court without a subpoena, is such a witness entitled to claim for witness fee?

"4. In Chancery cases where summons is issued for witness, but same is not served upon him by the Sheriff, and such witness appears voluntarily before the Court, is such witness entitled to claim for witness fee?

Answering your first inquiry, my answer is in the affirmative. Where the testimony is taken before a commissioner in an equity case, the costs of the witness are chargeable only on the certificate of the commissioner. He simply certifies that the witness attended before him and testified. The commissioner is without power to issue him a certificate of attendance. See Section 7761, Code of Alabama, 1928, (Michie).

My answer to your second, third and fourth requests is also in the affirmative. See Section 7761, supra, you will note this section says among other things: "Witnesses who attend and testify, with or without subpoena, are on the certificate of the commissioner of the distance traveled and the number of days' attendance, entitled to the same compensation as other witnesses."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. Roy Sanderson,
Judge of Probate,
Marion County,
Hamilton, Alabama.

June 14, 1938.

Licenses — A person dealing in witness script must pay state and county licenses in each county in which he engages in such business.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 8, 1938, which reads as follows:

"Please give me an immediate opinion on the following:

"Under Schedule 153, License Laws of Alabama, a man has paid a State and County license in Walker County, Alabama, to buy witness script, and he attends the courts in this County, Marion, and buys witness script in this county. He claims that the license required is similar to that of an attorney, and he does not have to pay a license in this county.

"I want your opinion as to whether I should collect from him the State license and county license in this county. This county, by order of Commissioners Court on the minutes, requires that when a State license is collected there shall be collected an additional license for the county of one half the state license.

"The party buying the witness script in this county has been cited by the License Inspector, and I want your opinion as soon as possible in order to deal with him as the law requires."

The license of persons dealing in witness script is levied by Schedule 153 of the 1935 Revenue Act, which reads as follows:

"Each person dealing in witness script, One Hundred Dollars (\$100.00)."

Of course, there is also levied by the 1935 Revenue Act for the use of the county 50 per cent of the amount fixed by Schedule 153, supra, for county license. Subparagraph (b) of Section 350 of the 1935 Revenue Act reads:

"(b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

As to the question of whether or not a person dealing in witness script in more than one county must pay the above licenses in each county in which he so deals in witness script, we refer you to subparagraph (a) of Section 350, supra, which provides:

"(a) Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided."

The person mentioned in your letter is required to pay these licenses for privilege of dealing in witness script. He deals in witness script in more than one county, and it may be said, therefore, that he has a place of business in

each county in which he deals, even though he might not actually have an established place of business in any county. Therefore, it is my opinion that he should pay the state and county license provided for persons dealing in witness script in each county in which he so engages in business. Cf. opinion to Hon. W. G. Little, Judge of Probate, Sumter County, Livingston, Alabama, under date of November 29, 1935, Quarterly Report of Attorney General, Vol. I, page 255.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Mrs. A. G. Teague,
Clerk Circuit Court,
Ashville, Alabama.

Costs — Copy of transcript provided for by section 6102 of the Code of 1923 held to be appellant's costs and collectible under provisions of Sections 7263 and 6102 of the Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your request under date of January 24, 1938 as follows:

"Kindly give me your official opinion on the following:

"Referring to Sec. 6102 Civil Code of Alabama, 1923, and quoting the following, 'He shall in making the transcript make a copy thereof for the appellee and deliver it to him or his attorney—'. Under the provisions of this Section and the circumstances surrounding an appeal can the cost of making this copy of the transcript required to be furnished the appellee (but not at his request) be taxed as plaintiff's cost and collected for under Sec. 7263, Civil Code of Alabama, 1923, even though the cost was taxed by the Supreme Court against the appellee who was the losing party?"

In reply, I wish to refer you to Section 6102 of the Code of 1923, which provides as follows:

"Section 6102. TRANSCRIPT MADE BY CLERK: FEES FOR— after taking an appeal in the manner herein provided, and filing in the cause a bill of exceptions, or the expiration of the time for filing, such bill of exceptions, or if the appellant sooner direct, the clerk, the register, or judge of probate, as the case may be, shall make out a transcript as required by law, and deliver the same to the appellant. He shall in making the transcript make a copy thereof for the appellee and deliver it to him or his attorney, and for the transcript he shall have ten cents for each one hundred words and for the copy five cents for each hundred

words, both of which shall be taxed as costs against the unsuccessful party in the appeal. The appellant shall be entitled to procure a copy of said transcript by paying therefor at the rate of five cents for each one hundred words; provided the appellant make request of the clerk, register, or judge of probate before the preparation of the original transcript."

The transcript required by law, to be made and delivered to the appellee or his attorney, is a part of the costs assessable in the case, and shall be paid by the unsuccessful party, against whom the costs are taxed where such unsuccessful party is not insolvent. I wish to refer you to Section 7263 of the Code of 1923, which provides as follows:

"WHEN EXECUTION AGAINST PLAINTIFF FOR HIS OWN COSTS; PENALTY FOR FAILURE TO COLLECT, ETC. The clerk of the supreme court, court of appeals, clerks of the circuit court, judges of probate, and justices of the peace, and registers, upon return of an execution 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, court of appeals, of the county from which the case was brought, may issue execution against the plaintiff, or against the plaintiff and sureties, or appellant and sureties as the case may be, for the costs actually created by the plaintiff, or appellant but for none other, to be collected and returned as other executions. Judgment may be rendered on motion in the circuit court of such county, in the name of the clerk or judge of probate issuing the execution, against the sheriff or his sureties, or either of them, upon three days' notice, for dereliction of duty on the part of the sheriff for failing to return, levy, or collect such execution so sued against the plaintiff or against the plaintiff and his sureties for such costs, as follows: Twenty per cent upon the amount of the execution for failing to return the same; for failing to collect the amount of such execution when the same could have been collected by said sheriff by the use of reasonable diligence, the full amount of such execution and ten per cent on the amount thereof as damages; and for failure to pay over the amount collected thereon, less his fees, the full amount of the sum so collected and not paid over, and five per cent per month damages for each month after demand."

It is my opinion that this copy of the transcript may be collected for as appellant's cost when the above quoted provisions of the Code of 1923 are followed strictly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Mrs. W. Lee Stanley,
Clerk of Circuit Court,
Colbert County,
Tuscombua, Alabama.

(1) Witness Fees — A witness certificate can only be issued by the clerk of the circuit court where the witness claims the said

fees, which claim must be made within five days pursuant to Section 7235, Code of Alabama, 1923.

(2. The clerk of the circuit court is to determine the amount the witness is entitled to for mileage and per diem.

Opinion by Assistant Attorney General Rowe.

Dear Madam:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Section 3763 of the Code of Alabama, 1923, provides in part as follows:

'Section 3763. The fees of witnesses, subpoenaed on the part of the State to appear before—any court in which a criminal prosecution is pending must be taxed against the defendant if he is convicted—'

"In an considered opinion rendered May 24, 1929, found on page 401, Biennial Report of Attorney General 1928-30. State witness fees in criminal cases are extensively discussed. It is here held that the term 'Subpoenaed' (as it appears in Section 3763) contemplates attendance at court on the part of the witness and that the issuance by Clerk of the subpoena alone will not justify charging the defendant with witness fees, but when the witness attends, it is the duty of the Clerk of the Court to issue a certificate as is provided in Section 3769, Code of 1923, which is quoted in part as follows:

'Section 3769. It is the duty of the Clerk of the Court to issue a certificate to each witness appearing on the part of the State, etc.,'

"It is held in quoted opinion shown above that Section 7235, Code of Alabama 1923, refers only to witnesses in civil cases and in the same opinion it is held that witnesses in criminal cases must prove attendance upon conclusion of cause.

"In *Tillman vs. Wood*, 58 Ala. 578, the Supreme Court used language as follows:

'For the reason that costs are in the nature of a penalty.'

"It seems to the writer that a witness certificate should be issued to each state witness who appears for the State and that the witness fees be taxed against the defendant and that no authority exists for failing to tax these witness fees against the defendant inasmuch as these costs are in the nature of a penalty. This will have the effect of the Clerk issuing the witness certificate and taxing the cost against the defendant whether the witness claims his fees or not. As it appears that this solution is necessary to comply with the law as laid down in Sections 3763 and 3769. It further seems that the Clerk is called on to determine if the witness has appeared and determine the mileage that he is

entitled to and on learning this he should tax the witness fees against the defendant."

Your request for opinion can be succinctly stated as follows:

(1) Whether the Clerk of the Circuit Court is to issue a witness certificate whether or not witness makes claim for his fees.

(2) Whether the Clerk of the Circuit Court is called on to determine if the witness has appeared and to determine the mileage that the witness is entitled to.

Please be advised that the opinion of this office found in Biennial Report of Attorney General, 1928-30, p. 401, referred to in your letter, in which it is stated that Section 7235, Code of Alabama, 1923, refers only to witnesses in civil cases, has been over-ruled in effect by opinions of this office found in Biennial Report of Attorney General, 1930-32, p. 613, and Quarterly Reports of Attorney General, Vol. IX, p. 50. It is therefore a necessary conclusion that a Clerk of the Circuit Court cannot issue a witness certificate unless the witness makes claim for the same and that this claim must be made within five days after the adjournment of the session of the court at which he attended.

Further, pursuant to Section 3763, Code of Alabama, 1923, the fees of witnesses are only taxable against the defendant when he has been convicted.

Further, it is my opinion pursuant to Section 7234, the Clerk of the Circuit Court must determine whether the witness has appeared and how much the witness is entitled to for mileage and per diem fees. Here again the witness fees can only be taxed against the defendant when he has been convicted. Where the defendant is not convicted, witness fees are taxed as set forth in Section 3763, Code of Alabama, 1923.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. C. H. Keller,
Register Circuit Court,
Cullman County,
Cullman, Alabama.

Bond given for security of costs as provided for in Section 6131, Code of Alabama 1923, does not cover costs which accrued before the taking of the appeal.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of February 26, 1938, which is as follows:

"In a Chancery case where the complainant loses his case in the Circuit Court and the costs are taxed against the complainant and from the decree of the Circuit Court he appeals to the Supreme Court of Alabama and makes appeal bond, which reads in part as follows:

We, J. H. Patterson and sureties, hereby acknowledge ourselves security for all the costs of an appeal taken to the Supreme Court of Alabama by the said J. H. Patterson from a judgment in this cause rendered in favor of respondent and against complainant on the 21st day of July, 1936, in the Circuit Court in Equity in Cullman County, Alabama.

"And to further secure the payment of such costs we and each of us hereby waive all our rights to claim exemptions under the Constitution and Laws of the State of Alabama.

J. H. Patterson (Seal)

M. W. Stisher (Seal)

V. S. Stisher (Seal)

"In this particular case the Supreme Court affirmed the decree of the Circuit Court and the costs assessed by the Supreme Court as follows: 'And it was further considered that the Appellant and the sureties on the appeal bond pay the costs accruing on said appeal in this Court and in the court below.'

"The Complainant in this case is insolvent. Are the sureties on his appeal bound liable for the costs accruing in the Circuit Court from the filing of the original bill, including the preparation of the transcript of the record of the Supreme Court, or are they only liable for the costs accruing in the Circuit Court and for the Supreme Court from the filing of the appeal bond? In other words are the bondsmen liable for all the costs in the case including the costs in the Supreme Court, or are they only liable for the costs in the Supreme Court?"

Section 6131 of the Code of Alabama, 1923, is as follows:

"Section 6131. SECURITY FOR COSTS; WHEN REQUIRED. — An appeal may be taken without giving bond to supersede the execution of the judgment or decree, by the appellant giving security for costs of such appeal to be approved by the clerk, register, or judge of probate; the names of the surety or sureties to be certified with the record to the appellate court; and execution may issue against such sureties for the costs in such court and the costs of the transcript, if decided against the appellant."

It is my opinion that the language of the above quote section is plain and unambiguous and very definitely limits the liability of the sureties on the appeal bond to the costs incurred in the appellate court and in the preparation of the transcript.

In the case of **King and Owens v. McCann**, 25 Ala. 471, motion was made to strike the case from the appeal docket because no bond was given for the appeal nor security for costs. The Circuit Clerk certified that "no bond was required because no costs have been paid." The Supreme Court granted the motion to strike on the ground that the security required by Section 6131 (3041) is not for the costs which have accrued, but for the costs on the appeal.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centreville, Alabama.

Courts of County Commissioners—Probate Judge—(1) Each member of the Court of County Commissioners may supervise and inspect the construction and maintenance of all the public roads in the county when so authorized by the Court Governing body and is not limited to either supervision or inspection or as to the roads in his district.

(2) All claims against the county should be paid in the order of their allowance and registration, except claims denominated preferred claims by statute.

(3) The gasoline fund accruing to a County under schedule 156.9 must be used for the construction and maintenance of the public roads and bridges of the county and may be separated and allotted to the separate districts as the Court of County Commissioners may order.

(4) One-third of the gasoline fund accruing to each county may be set aside for the retirement of past due debts for the construction and maintenance of public roads and bridges which must be paid in the order of their allowance and registration.

(5) Courts of County Commissioners may make such rules and regulations not contrary to or inconsistent with the statutes, as they deem necessary in the purchasing of supplies for the county.

(6) Probate Judge, as chairman of the Court of County Commissioners is liable on his official bond for warrants issued by him without authority of law notwithstanding the fact that the claims have been audited and allowed by the Court of County Commissioners.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter which requests my opinion as follows:

"Bibb County is divided into four Districts, each District electing a Commissioner. I desire to have your opinion on the following questions.

"Can the Commissioner supervise as well as inspect roads in his District?

"One District is about \$12,000.00 in debt, all the claims being duly filed. Can the Commissioner pay such claims as he desires, or should the money be prorated?

"Can the Commissioners Court separate or allot one-fourth of the Gasoline Fund, regardless of mileage, to each District, or are all obligations against the County to be met out of the Gasoline Fund as a whole?

"Is there a certain amount of Gasoline Fund set aside for retirement of past due debts and if so, have I the right as Chairman to issue warrants for payment of past due debts and should payments be made pro rata?

"Should all supplies purchased for the Road Department be made by requisition and purchase order?

"Am I liable on my bond for the issuance of irregular or illegal warrants where the claim is passed by the Commissioners Court. The Commissioners themselves are bonded.

Your first inquiry should be answered in the affirmative. By Local Acts of 1937, page 63, it is provided as follows:

"Each member of the Court of County Commissioners of Bibb County, Alabama shall be paid * * * out of the gasoline excise tax fund * * * accruing to Bibb County, for their services in inspecting the work of maintenance, up-keep, and repairing the public roads of Bibb County, or for their services in supervising such work on said roads.
* * * "

It is my opinion that this Act empowers each member of the Court of County Commissioners to inspect and supervise the roads, not only in his district but in Bibb County as a whole. There is nothing in the law limiting their authority merely to supervision as distinguished from inspecting the record in their respective duties. Nor do I find anything in the law limiting their authority or responsibility merely to the roads in their respective districts but it is my opinion that the County Commissioners may be directed by the County Governing Body to supervise and inspect the roads not only in their respective districts but in the County as a whole.

In answer to your second inquiry, I wish to advise you that in my opinion all claims against the County must be paid in the order in which they are allowed by the Court of County Commissioners and registered in

the book kept by the Commissioners for that purpose as provided by Section 224-225 of the Code of Alabama 1923; except that certain claims are made preferred claims by statute and these take precedence and priority. See Section 231, Code of Alabama 1923, as amended by General Acts 1931, page 235 and General Acts 1935, page 162 and page 990.

In reference to your third inquiry, please be advised that Schedule 156.9 of Article 13, General Acts of 1935, page 511, provides that one-third of the excise tax imposed on gasoline by schedule 156.1, less the cost of collecting and administering is to be divided and distributed equally among the sixty-seven counties of the State and "shall be expended exclusively in the construction, maintenance and repair of roads and bridges in such county." By section 6754 of the Code of Alabama 1923, the Court of County Commissioners possesses original and unlimited jurisdiction in relation to the establishment, maintenance and construction of roads and bridges within the County. **Edwards vs. Bibb County**, 193 Ala. 554. Further this office has held that the budget act is not applicable to the gasoline tax fund, Opinions of Attorney General, Quarterly Report, Vol. 5, page 32, 38 Vol. 9, page 22. I, therefore, advise you that in reference to the gasoline fund received by your county the Court of County Commissioners has unlimited jurisdiction as to the expending of this money and may separate and allot the fund within the county as the Court of County Commissioners may order so long as the fund is expended "exclusively in the construction, maintenance and repair of roads and bridges in such county."

In answer to your fourth inquiry, General Acts of 1936, page 28 provides as follows:

"Section 1. The Board of Revenue or Court of County Commissioners or other governing body of each and every county in Alabama is hereby authorized and empowered to expend an amount not to exceed one-third of the total amount that may be received by each county from the levy and collection of any tax on gasoline in the payment of any debt that may have been heretofore incurred by such county for the construction and/or maintenance of roads or bridges.

"Section 2. All expenditures heretofore made for the purposes and from the funds named in Section 1 of this Act are hereby ratified."

I previously advised you that all claims against the County must be paid in the order in which they were allowed by the Court of County Commissioners and registered. I, therefore, advise you that as Chairman, you must under the law issue warrants from the above fund for the payment of past due debts in the order in which they were allowed by the Court of County Commissioners and registered in the book kept for that purpose and cannot be prorated.

In answer to your fifth inquiry, I can find no law which requires that supplies purchased for the road department be made by requisition and purchase order. It is my opinion pursuant to Section 6755 Code of Alabama 1923. Courts of County Commissioners may make such rules and regulations as they deem proper for the purchase of necessary supplies for the County.

Your sixth inquiry is answered in the affirmative. A Probate Judge where he acts as Chairman of a Commissioners Court must sign all warrants

ordered to be drawn by the Court of County Commissioners. Section 321 of the Code of Alabama 1923 provides in part as follows:

"Such officer signing such warrants shall be liable for the amount of any warrant drawn and paid by such depositories without the authority of law."

This section has been interpreted that notwithstanding the fact that, although all claims are audited and allowed by the Commissioners Court, yet if the payment has been made without authority of law, the Probate Judge or president of the Court of County Commissioners is liable on his bond for the amount of these warrants. See Biennial Report of Attorney General, Vol. 6, page 5. This principle has been recognized by the Supreme Court in the case of *Rowe vs. Johnson*, 214 Ala. 510.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Elba, Alabama.

Elections—Proposed constitutional amendment.

The expenses of election supplies in the election upon the proposed constitutional amendment provided for by Acts 1936-1937, page 234, are not payable from county funds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Section 6, Act of or resolution of Legislature of February 26, 1937, (Extra Session Acts, pp. 235-6) reads as follows:

"The expenses of the election hereby ordered upon said proposed amendment and the costs of the publication of the notices shall be paid out of the State Treasury in the same manner as the expenses of other elections are paid."

"This proposed amendment affects only one County, namely, Limestone County. The day set for the special election is May 3, 1938. Section 6 of the resolution provides for the expenses to be paid 'out of the State Treasury', and then goes on to say, 'in the same manner as the expenses of other elections are paid'. Does the County pay for the expenses?

"Sections 526, 527, and 528 of Code (Article 19) relative to Constitutional Amendments, makes no provision for payment by County.

"The expenses of primary elections are paid by County, also general elections. This resolution does not provide payment by county, but by the State, that is, 'out of the State Treasury'. It cannot mean out of the County Treasury in the same manner as the expenses of other elections are paid.

"Is Coffee County charged with the expenses of election supplies for this proposed amendment?"

In my opinion, Coffee County is not charged with the expenses of election supplies for the election upon the proposed constitutional amendment.

Section 6 of Acts Extra Session 1936-37, page 234, quoted in your inquiry, supra, evinces the specific legislative intention that the expenses of the election upon the constitutional question should be paid out of the State Treasury.

Except for such specific provision for the payment of expenses, the same are paid by the county, as in other elections. Compare **Biennial Report of the Attorney General, 1930-32**, page 468; **Quarterly Report of the Attorney General, Vol. II**, p. 286.

The phrase, "In the same manner as the expenses of other elections are paid", does not, in my opinion, indicate the legislative intention that the expenses of this particular election should be paid from county funds.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 14, 1938.

Hon. W. A. Jackson, President,
Board of Revenue, Barbour County,
Eufaula, Alabama.

County funds set aside in a sinking fund for the purpose of retiring bonded indebtedness on a certain specified date may be used by the County before that date, for the purpose of retiring a portion of the bonded indebtedness, where such use would result in a saving to the county.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of April 7, 1938, which is as follows:

"Like all counties—Barbour County, issued some **'Road and Bridge Bonds'**. These bonds all mature in 1941. **All in a lump sum.** Our Board of Revenue arranged, and provided a 'sinking fund' to anticipate the payment of these Road and Bridge Bonds, and set aside \$2000.00 in 1937, and a like sum in this year.

"The bonds so issued are not yet due, and will not mature until 1941. Some of these bonds are being offered for sale at around \$110. We have \$4,000.00 cash on hand for the purpose of applying on the bonds when they become due.

"We would be glad if you would advise us if the Board of Revenue would be permitted—and in their legal rights, to redeem such of these bonds as our funds will permit at about par, or around the quoted price. Our funds, on hand are idle, and the County can save some money if we are permitted to redeem such bonds as we can."

I am of the opinion that the sinking fund set up by Barbour County to retire Road and Bridge Bonds of the county in 1941 can be used to retire those bonds, or a portion thereof, prior to the maturity date of the bonds when such premature retirement would result in a substantial saving to the county.

I am herewith enclosing a copy of an opinion rendered by this office on April 10, 1935, to the county solicitor of Limestone County, which deals with the question in hand.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 14, 1938.

Hon. Roy O. Hill,
Clerk Circuit Court,
Houston County,
Dothan, Alabama.

Where judgment is obtained and is collected in part or in whole, the costs of the case is the first item to be paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date, in which you state that sometime ago a party was tried in the Circuit Court of your county and convicted for the offense of bastardy. Failing to make bond as required by law, he was sentenced to serve a term of one year in the State Penitentiary. You state that he is now out; that at the time he was convicted, there was a judgment rendered against him for \$500.00 for the support of the bastard child; that

recently a garnishment has been run; and that certain parties were indebted to him and that \$165.00 was collected on this garnishment on the judgment.

Your desire to know how this money should be distributed. Should the costs be paid out of this, that is, the costs of the original suit and the cost of the garnishment, or should all this money go to the support of the child?

Whenever a party brings suit in any court in Alabama and calls into action the machinery of the court, if he is successful, he not only recovers judgment for himself but also recovers a judgment for costs. But, he also recovers this judgment ostensibly for himself, but actually for the officers of the court. At the common law cost was not recoverable. It is only by statute that we are now permitted to assess the same.

If the plaintiff recovers in his suit, he also recovers the costs and is bound to pay this cost to the officers to whom it goes. In the case of **Ranck v. Hill, Executor**, 3 Barr (Pa.) p. 423, it was held:

"The fees of officers are part of the plaintiff's costs which he is supposed to have paid to them, and which he collects ostensibly for himself, but actually for them, by his execution; and such has been the practice from the foundation of the state as a province."

This case was digested by Mr. Mayfield with approval. Vol. VIII, p. 208. I am unable to find where our courts of last resort have passed on this question, and certainly up to the time of Mayfield's Digest they had not passed upon it, this is why Judge Mayfield goes outside to find a case bearing on this question.

In the above case it was held that the legal title to the cost was in the plaintiff, **but only as a trustee**. Trustee for whom? For the officers to whom the cost must go. Therefore, we are of the opinion that when the plaintiff recovers his judgment together with the cost of the suit and the levy is made under execution or the judgment is collected by the clerk or sheriff without execution, the cost of the litigation is the first item to be paid out of the proceeds of the judgment. This has always been the custom in Alabama and I doubt not if this matter was to go before the Supreme Court this court would say that the custom so long in force in Alabama had become an unwritten law. This would be no vile presumption for certainly as far back as we are able to go, this principle has been recognized by the courts, by litigants and by officers.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 14, 1938.

Hon. Fred H. Price,
Clerk of the Circuit Court,
Autauga County,
Prattville, Alabama.

Where a defendant is convicted and sentenced to the penitentiary in two separate and distinct cases, there should be two separate and distinct cost bills showing the costs in each case, and when the convict is turned over to the penitentiary authorities the costs in each case should be paid by that department.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 25, 1938, in which you request my opinion as follows:

"By way of illustration defendant H was held in jail under warrant and affidavit and was indicted for Murder and Assault With Intent To Murder at the January 1938 session of the Grand Jury and no capiases were issued and was later sentenced in each case.

"Q. Would the Clerk be entitled to fees for Docketing Cause, Attending Trial, Entering Judgments, Making Final Record, Making Transcript to Penitentiary in each case, or the second case as well as the first case?

"Q. Would Section 3278, Code of Alabama, 1923 govern fees of the Sheriff in the second case?

* * * * *

"Defendant C was indicted at the July Term, 1935, of the Grand Jury for Manufacturing Liquor and Possessing a Still, and a Writ of Arrest was issued immediately. The defendant was never apprehended and was subsequently indicted at the July Term, 1937, of the Grand Jury for Murder. A Writ of Arrest was issued in this case also. Approximately four months after the Murder indictment was returned the defendant was arrested for a misdemeanor in another State and held for Autauga County authorities. The sheriff of Autauga County immediately went to the place where the defendant was held and the defendant was placed under arrest by him under both capiases and both cases later docketed. Upon trial, the defendant plead guilty in both cases and was sentenced to the penitentiary. Whereas, the following questions arise:

"1. Shall the Convict Department pay for the issuing of a capias in each case?

"2. Shall the Convict Department pay for the arrest fees in each case?

"3. Should each case be treated separately and apart from the other in regards to costs and fees?"

My answer to your first request is in the affirmative. It is my opinion you are entitled to the cost enumerated above. Of course, you would not be entitled to costs for issuing capiases if you did not issue any, and you say you did not. What I am saying would include both cases, as each case, as stated by you, is a separate and independent charge, one murder and the other assault with intent to murder, I call your attention to Section 3670, Code of Alabama, 1923, which is as follows:

"Section 3670. CLERK MUST SWEAR TO BILL OF COSTS AND FORWARD TO PRESIDENT OF THE BOARD; LIMIT; HOW PAID.—After such conviction, the clerk of the court in which the conviction is had, shall make out a bill of the costs in the case, containing no items not enumerated in the preceding sections; he shall make oath to the correctness of each item of said bill, and that the same is a legal charge against the defendant; he shall forward the bill of costs to the president of the board or the officer discharging his duties, who shall carefully examine the same, and if found correct, he shall request the state auditor in writing to draw his warrant upon the state treasurer for the payment of said bill to said clerk out of the convict fund. No costs shall be paid, until the convict has been delivered to the penitentiary officials, **and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall be paid when he is delivered to such officials."**

In this particular case, I do not think that Section 3278, Code of Alabama, 1923, would apply, as I gather from what you say the defendant was not held on the capias but was held by virtue of the indictment being at the time already in jail.

Answering your second request, which you number 1, 2, and 3, my answer is in the affirmative. As stated concerning your first request, each case stated by you is a separate and distinct prosecution and should be paid on conviction and delivery of the convict to the officials of the Convict Department as provided by Section 3670, supra. I might say here that this section is different from the corresponding section in the Code of 1907 as shown by Section 6575. Here the costs were not paid in the second case until the convict had finished his term in the first case, but, as can be seen by reading Section 3670, supra, all the costs in each case must be paid on the delivery of the convict to the penitentiary authorities.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

Hon. E. C. Torbert,
Register, Circuit Court,
Hale County,
Greensboro, Alabama.

June 14, 1938.

Where all the cost of the Supreme Court includes only the making of the transcript and transmitting it to the Supreme Court, and such costs being collected, it should not be prorated among the other

officials, as the register who prepared the transcript is the only one entitled to same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 27, 1938, in which you request my opinion as follows:

"Please advise me as to how the money collected in the following case should be handled.

"I have a case appealed from the Equity Court to the Supreme Court which was sent back for a new trial, the cost in the appeal was \$109.64, which amount has been paid; the other court costs have not been paid. Should the amount collected be paid to the ex-Register or should it be prorated to all the costs."

I also have your letter of May 16, 1938, in reply to my letter asking for further information, which is as follows:

"I am enclosing a cost bill in the case which I asked for an opinion on as to the distribution of the costs which have been paid.

"As you will see only the costs of the appeal have been paid so far. There has been nothing done about this case since the ruling of the Supreme Court; the parties are about to agree upon a settlement, and if they do then may be that I can collect the balance of the costs."

I gather from the bill of costs which you enclosed that the money which has been paid to date was paid to cover the costs incurred in perfecting the appeal to the Supreme Court. This being true, all of this cost goes to him as he was the one who did the work. In preparing the transcript for the Supreme Court, no one else has any interest in the same, therefore, this cost could not and should not be prorated as no one else has any interest or claim in same.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 14, 1938.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Probate Judge—

Not entitled to any fee or commission for handling money paid into Probate Court, pursuant to order for condemnation of lands, by the person condemning the same, for owners of said lands.

Dear Sir:

I have your letter as follows:

"On October 26, 1937, a petition was filed in this Court styled Alabama Power Company vs. Bessie Rivers et al for condemnation of lands. Appraisers were appointed, their report made, order of condemnation was entered.

"On January 4, 1938, the Alabama Power Company paid into this Court one large check to cover court costs and the rest to be distributed to six different owners.

"Before paying this money to the owners, I would like to get your opinion as to whether the court is entitled to a 1½ per cent commission or fee for handling this money, if so, who is to pay this commission or fee, the Power Company, or the land owner."

The only provision which I find for the payment of a commission or fee of 1½ per cent to the Probate Judge for receiving and paying out moneys is the provision contained in Section 8254 of the Code of Alabama, 1923. This section reads as follows:

"The judge of probate shall keep a well bound book in which he shall enter a separate account with each person for whose use he shall receive and pay out such money, which book shall be open to inspection, and as each payment is made the judge of probate shall take a receipt therefor which shall be preserved by him. For receiving and paying out such money, he shall be entitled to a commission one and one-half per cent. Upon his retirement from office, he shall pay over to his successor any such fund left in his hands."

You will note that this section is a part of Article 11 of Chapter 299 which is styled: "JUDGE OF PROBATE CUSTODIAN OF FUNDS OF MINOR OR PERSON OF UNSOUND MIND, NOT EXCEEDING TWO HUNDRED DOLLARS; DISBURSEMENT OF SAME." This Article consists of Sections 8250-8254. It seems that Section 8254, supra, is new to the Code of 1923 and that the same was written by the Code Commission. The Code Commission evidently thought it advisable to have the records on this subject preserved carefully and also thought that the Probate Judge should be entitled to a fee for his services in receiving and paying out this money. However, this section, allowing this fee or commission of 1½ per cent refers to "such money". I think that there is no doubt that this means the money of minors or persons of unsound mind, not exceeding \$200.00, dealt with in this article. Therefore, you would not be entitled to a fee or commission of 1½ per cent on the monies described in your letter of inquiry by virtue of the provisions of said Section 8254.

A careful examination of the statutes covering fees, commissions, allowances, etc. to Judges of Probate fails to disclose any statutory provision allowing a Judge of Probate a fee or commission of 1½ per cent of the monies described. Further, this examination fails to disclose any statutory provision allowing any fee or commission whatever to the Judge of Probate in such a case.

Section 7255 of the Code of Alabama, 1923, provides as follows:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

Under this well known rule of statutory construction, an office claiming a fee or commission must point to specific statutory authority for the same.

The premises considered, it is my opinion that you are not entitled to any fee or commission for handling the monies described in your letter of inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 14, 1938.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Licenses and Taxation—

Motor Vehicles—Non-resident owner—

(1). Under and by virtue of an agreement of reciprocity entered into by the taxing authorities of the states of Alabama and Georgia, which such agreement is authorized by Schedule 158.15 of the Revenue Acts of 1935, as amended by Acts Extra Session, 1936, page 208, the owner and operator of a motor truck used solely for the transportation of his own goods, wares, and merchandise, who has complied with all the motor vehicle registration laws of Georgia, may operate said motor vehicle in Alabama without first procuring Alabama motor vehicle license plates.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"A person owns and operates a bottling plant in the City of Opelika, and has paid all licenses due by him as a bottler and has also provided the proper license tags for all trucks owned and operated by him in the delivery of his products within the State of Alabama.

"He maintains a warehouse in LaGrange, Georgia, to which said warehouse products bottled in Opelika are delivered and stored for sale within the State of Georgia.

"The person owning said plant in Alabama owns a delivery truck, which remains in Georgia, for the delivery of products from the warehouse within the State of Georgia. This truck has been provided with the proper license plates and has met all the requirements of the laws of Georgia.

"The owner desires to have this truck come to Opelika once or twice a week to procure bottled products from the Alabama plant and to carry them back to Georgia for storage in said warehouse, for sale and delivery therefrom.

"Since this man has complied with the laws of Georgia, and since said truck is not situated within the State of Alabama, would he be required to purchase an Alabama license plate in order to come into this state to transport products, bottled in Opelika, back to his warehouse in Georgia?"

In my opinion, your inquiry must be answered in the negative. Schedule 158.15 of Section 348 of the Revenue Act of 1935, as amended by Acts Extra Session, 1936, page 208, provides in part as follows:

"The State Tax Commission of Alabama is hereby authorized to make reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that will be considered as a fair exchange of rights and privileges. The said rights and privileges to be in effect as long as both contracting parties recognize the rights of the other.

"The above reciprocal agreement can be annulled on a notice issued to either party by the other party thereto within thirty (30) days thereafter."

Pursuant to such authority, the State Tax Commission of Alabama and the State Revenue Commission of Georgia entered into an agreement of reciprocity, under date of September 26, 1936. Paragraphs 2 and 5 thereof provide:

"Paragraph 2. That any truck or combination of truck and semi-trailer operated by the owner, or duly authorized agent thereof, for the purpose of transporting goods, wares or merchandise, the actual property of the owner of said vehicle, shall be allowed to operate in the State of Georgia without a Georgia license or registration for the actual period covered by the license issued by the State of Alabama. However the provision does not permit residents of either State to go into the other State and buy up agricultural or farm products, or other goods and peddle or offer the same for sale in the other State without registering such vehicle and obtaining a license tag therefor in such State.

"Paragraph 5. Likewise, motor vehicles duly licensed and properly registered by the State of Georgia shall enjoy the rights and privileges exactly similar and corresponding to those described hereinabove when operating in the State of Alabama."

I am advised by the State Tax Commission of Alabama that the agreement of reciprocity is still in full force and effect.

The operator of the motor vehicle described in your letter of inquiry comes squarely within the provisions of the agreement of reciprocity; and he is, therefore, not required to obtain Alabama license plates in order to continue such operation.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 24, 1938.

Hon. William Varner,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

A person taking out a license under Subsection (b) of Schedule 104 of Section 348, Alabama Revenue Act 1935, must procure both State and county license in every county in which he offers to do business.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 17, 1938, in which you request my opinion as follows:

"Section 104, (b) of License schedule, peddlers of drugs, state forty dollars shall be paid to the State and forty dollars to each county in which they do business.

"A person has procured a license in another county, paying the above amount. He desires to do business in this County and wants to take out the proper license, is he due the State license and the County or only the county license."

It is my opinion that a party who takes out a state and county license to do business under Schedule 104, Subsection (b) of Section 348, Alabama Revenue Act of 1935, must secure such license in every county in which he does business. This is based on an opinion of this office written to Hon. N. P. Tompkins, Judge of Probate, Colbert County, under date of October 25, 1935, Quarterly Report of the Attorney General, Vol. I, page 117. That part of Schedule 104 of Section 348, Alabama Revenue Act of 1935, referred to above, is as follows:

"(b) Each itinerant vendor or peddler of spices, flavoring extracts, toilet articles, soaps, insecticides, stock and poultry supplies; proprietary medicines and household remedies in original packages and other packaged articles of like kind commonly used on the farm and in the home,

who use a motor vehicle solely for the purpose of transporting merchandise from house to house or place to place who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers or prospective purchasers to enter said vehicle for the purpose of inspecting or purchasing merchandise shall pay an annual license of Forty Dollars to the State and Forty Dollars to each county in which they do business, * * * "

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 24, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Taxation—Tax Assessor—

1. When it is determined that a homestead exemption accorded a taxpayer was granted through the fraud or negligence of the tax assessor after the tax had been paid and the tax year closed and no fraud can be shown on the part of the taxpayer, no recourse can be had by the state against the taxpayer but the tax assessor is liable on his bond to the state for the amount of the error.

2. Where the error is found before the close of the tax year, the State Tax Commission, even though the tax has been paid, has the right to reassess the property and direct the tax collector of the county to collect the same as in the ordinary case.

3. Where the tax collector cannot collect the same, he has the authority to list the unpaid tax as delinquent to the Probate Judge.

4. Upon receipt of this delinquent tax, the Probate Judge has the authority to issue a decree of sale for this unpaid tax as in other delinquent cases.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you request my opinion on the following:

"When it is determined that the exemption accorded a taxpayer on a homestead exemption certificate has been wrongfully allowed after the payment of the tax on which the exemption applied.

"(1) Hasn't the tax assessor authority to notify the tax collector that the exemption was wrongful and should be collected by filing a supplemental abstract for the part of a tax that was exempted?

"(2) After the tax collector has been notified by the assessor that the exemption was wrongful and should be collected, hasn't the tax collector authority to list the unpaid part of taxes or the part that was wrongful exempted as a delinquent to the Probate Judge?

"(3) Upon receipt of the list of delinquent taxes, hasn't the Probate Judge authority to issue a decree of sale for this unpaid tax or the part that was wrongful exempted, just as he does in other delinquent cases?

"(4) Where it is determined that the tax assessor made an error in the exemption accorded a taxpayer on a homestead exemption certificate, isn't the tax assessor liable on his bond to the State for the amount of said error."

In considering your questions, I will assume first that the tax year has been closed. That is, that the error in granting the exemption was not discovered until after October 1st of the following tax year. It is my opinion that in this case, nothing can be done to correct the error as against the taxpayer or to collect the same from him unless fraud, either actual or constructive, can be shown on the part of the taxpayer. The Supreme Court has held in the case of **Anniston City Land Company vs. State**, 185 Ala. 482, at p. 489:

"We are at the conclusion, therefore, that this proceeding is in effect an effort on the part of the state, not to reach property that has escaped taxation, but to revise assessments once made, and upon which taxes have been collected. The defect in these assessments might have been remedied by the assessor or the commissioners' court during the then current years. It is now too late either to change the valuation or to annul an exemption then claimed and allowed."

Further, in the case of **State vs. Doster-Northington Drug Co.**, 196 Ala. 447, at p. 452, it was held:

"If Section 2223 can be construed to confer authority on the State Tax Commission, at any time after the expiration of the tax year, to set aside and hold at naught any valuation of assessment of property made by the owner or any of the officers authorized by law to make assessments, it might become the source of great vexation, and of even oppression, to the taxpayer, and render uncertain property rights, and subject the taxpayer and his property to unreasonable and uncertain claims and tax liens.

"A proper construction, therefore, of Section 2223, in connection with Section 2260 and with the general taxing system of the state, would require that this power 'to set aside and hold for naught' tax valuations and assessments be exercised by the State Tax Commission before the end of the current year."

The above principles have been reaffirmed in the following cases: **State vs. Mortgage Bond Co. of N. Y.**, 224 Ala. 406; **Tennessee Coal, Iron & Railroad Co. vs. Board of Education of Jefferson County**, 80 Fed. (2) 310.

The only time a review of an assessment such as the one we are considering here can be made by the state after the close of the tax year, is

when the same is tainted with fraud, either actual or constructive, on the part of the taxpayer or for want of jurisdiction on the part of the taxing authorities. *Anniston City Land Co. vs. State*, supra; *Norwood vs. Anderson-Tully Co.*, 53 S. W. (2) 17.

In the absence of such fraud, this cannot be treated as an escape, as the fact remains that the entire piece of land was assessed either for taxation or as exempt, and upon such assessment the state has collected its taxes. The validity of the assessment as affecting this collection cannot now be reached by an escape assessment. *Anniston City Land Co. vs. State*, supra.

Where the tax year has not closed, that is, if the error in allowing the exemption is discovered before October 1st of the next tax year, even though the tax has been paid on it, it is my opinion that the state has the right to review assessments in the manner provided by the statutes. *State vs. Jefferson County Bank*, 200 Ala. 287.

The statutory provision to set aside, review and correct an assessment or exemption on the part of the state is contained in Article IV, Section 93 of the Revenue Laws of 1935 (General Acts, 1935, at p. 299), and that power is granted to the State Tax Commission as follows:

"Section 93. It shall be the duty of the State Tax Commission, and it shall have the power and authority, in addition to the authority now in it vested by law. * * *

"(b) To equalize, value and assess or cause to be equalized, valued and assessed, any property subject to taxation, and such valuations and assessments it shall enter or cause to be entered in the proper assessment books, or record, or minutes of the proper official, board or tribunal; to set aside all assessments so entered in any assessment book, record or minute within any time before the end of the assessment year, and after ten days' notice given the taxpayer which notice shall be given by registered mail return receipt demanded, of the time and place of hearing, revalue and reassess said property and cause such revaluation and assessment to be entered in the proper assessment book record or minutes in lieu of the original valuation and assessment, provided, that no reassessment or revaluation shall be made of any particular assessment from which an appeal is then pending, or if the valuation of the property for that year has been fixed on appeal by the Circuit Court or Supreme Court; provided further that parties may appeal from such revaluation and reassessment to the circuit court within like time and in like manner as from the valuation and assessment as fixed by the Board of Review."

Therefore, with the limitations hereinabove noted, your first question must be answered in the negative.

When this has been done by the State Tax Commission and no appeal is taken by the taxpayer, the State Tax Commission should direct the tax collector of the county to proceed to collect this tax as in the ordinary case.

In answer to your second inquiry, after the tax collector has been notified by the State Tax Commission to collect the tax, it is his duty to

proceed pursuant to Article VI of the Revenue Laws of 1935, at p. 334. And if he is unable to collect the taxes, then he has the right to list them as delinquent to the Probate Judge.

Your third inquiry should be answered in the affirmative.

In reply to your fourth inquiry, when the error is discovered before the end of a tax year, the tax can be collected as outlined above or the property on which the same is a lien can be sold for taxes. If the error is discovered after the close of the tax year and the exemption was granted through the fraud or negligence of the tax assessor, and no fraud can be shown on the part of the taxpayer, it is my opinion that the tax assessor would be liable on his bond to the State for the amount of the error; as it is the duty of the tax assessor to inspect and examine real property in his county and this duty is directory. (Article III, Section 79, Revenue Laws of 1935, p. 296). It is primarily the duty of the tax assessor to grant and allow exemptions claimed by the taxpayer and where he grants an exemption through his negligence or fraud, and it is impossible to proceed against the taxpayer or the property, it then falls upon the tax assessor to make up this loss.

The opinion of this office addressed to you under date of January 7, 1938, wherein the same conflicts with the present opinion, is overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 24, 1938.

Hon. Wm. D. Peeler, Register,
Circuit Court in Equity,
Lauderdale County,
Florence, Alabama.

Register—Fees—

- Openly 23, 25*
1. Register entitled to fee for preparing transcript of record for appeal to the Supreme Court of fifteen cents for each 100 words of transcript which includes the cost of furnishing a copy to the appellee.
 2. Register of the Circuit Court is required to keep an office copy of a transcript on appeal to the Supreme Court for which he is authorized to charge five cents for each 100 words.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Please give to me the fees that I as Register would be allowed to charge for the original transcript to the Supreme Court, under Section 7283, of the Code of Alabama 1923, which provides, 'records for the Supreme Court for each one hundred words when not otherwise provided for herein fifteen cents', which seems to be in conflict with Section 6102 of the Code of Alabama 1923, which provides ten cents for the original transcript to the Supreme Court or Court of Appeals.

"In other words, which of these two section prevails, Section 6102 or Section 7283. Also, in your opinion please state whether the five cents per hundred words as provided for in Section 7283 of the Code of 1923, is a correct charge for the Appellee's copy and the office copy."

It is my opinion that Section 6102 of the Code of Alabama, 1923, applies to this situation. Under the Code of 1907 there was no duty upon the register to supply the appellee with a copy of a transcript in a case appealed to the Supreme Court and the present Section 7283 of the Code of Alabama, 1923, was then the effective law. Subsequently by laws of 1919, page 884, Section 2, the present section 6102 was enacted which placed upon the register the duty of making a copy of the transcript for the appellee. Under the ruling of **Middleton vs. General Water Works, and Electric Corporation**, 25 Ala. App. 455, Cert. Den. 227 Ala. 219, it is my judgment that Section 6102 controls, but the same amount of fees are charged under Section 6102 as would be charged under Section 7283. Since with the duty upon the register to supply a copy of the transcript to the appellee, the cost of the transcript is fifteen cents per one hundred words, that is, ten cents for each one hundred words for the original and five cents for each one hundred words for the copy to the appellee.

So that in accepting the view that the later pronouncement by the legislature in Section 6102 controls the situation yet this in effect does not repeal Section 7283 but both may stand together. To the same effect see also Quarterly Report of the Attorney General, Vol. 8, page 322.

Further in the Code of 1907, there was no duty upon the clerk of any court from which an appeal would lie to the Supreme Court or Court of Appeals, to keep a copy of the transcript on file, but by laws of 1915, page 336, the present Section 6108 of the Code was enacted. This section specifically states that the clerk of all courts from which an appeal lies to the Supreme Court or Court of Appeals, shall be required to keep on file at their office an exact copy of the record.

It is my opinion that this section applies to the Register in Equity as it is my opinion that in all courts from which an appeal lies to the Supreme Court or Court of Appeals an exact copy of the record must be made by the Clerk of the court and kept in the file of his office. The Register in Equity has many powers and is charged with many duties not vested in nor imposed upon ordinary clerks, but it is fundamental that a Register in Equity is the Clerk of that court and the Supreme Court has held that a necessary implication is as efficacious as an expressed command, **Swindle vs. Crocker**, 217 Ala. 199.

As to the amount to be charged by the Register for making and keeping an office copy it is my opinion that Section 6108 of the Code and Section 7283 are in conflict as to the amount to be charged for making and keeping the office copy and following the reasoning contained in the case of

Middleton vs. General Water Works and Electric Corporation, supra, Section 7283 controls and that the proper cost for the office copy would be five cents for each one hundred words. Further see Quarterly Report of Attorney General, Vol. 5, page 130.

The opinions of this office found in Vol. IX, at pages 30 and 91, in so far as the same are in conflict herewith are expressly overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 24, 1938.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Taxation—Act No. 81, H. 259, approved February 3, 1937 (General Acts 1936-1937, p. 91), relative to redemption of land, sold for taxes and bid in by the State prior to January 1, 1935, applies only where State has not parted with title.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of February 24, 1938, which is as follows:

"By act approved September 14, 1935, (1935 Acts, p. 1112) it is provided that a mortgagee having a mortgage duly recorded at the time of tax sale shall have the right to redeem from such tax sale at any time within one year from the date of written notice, by registered mail, to the mortgagee.

"Act approved February 5, 1937, (1936-37 Acts, p. 91) provides that when any real estate has, prior to January 1, 1935, been sold for taxes and bid in by the state, all persons having a right to redeem may do so by paying in four equal installments without any interest or penalties, if application to make such redemption is made before January 1, 1938.

"Under these and any other pertinent statutory provisions, will you please advise this office whether a mortgagee who has not been given the said notice by registered mail and having a mortgage of record at the time of tax sale to the state for 1932 taxes held on November 20, 1933, has the right to redeem from such tax sale without any interest or penalties under said Act approved February 3, 1937, the said mortgagee having made application for such redemption before

January 1, 1938: NOTWITHSTANDING THE FACT the State Land Commission sold and conveyed the said real estate to a third party (a stranger to the title) on September 24, 1937."

I am of the opinion that your inquiry should be answered in the negative.

Acts No. 81, H. 259, approved February 3, 1937, (General Acts 1936-1937, p. 91), applies only when the State has not parted with its title. Said Act provides as follows:

"Section 1. Whenever any real estate has prior to January 1, 1935, been sold for taxes and bid in by the State at tax sale, the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions shall apply: All persons having the right to redeem, such redemption shall be made as in other cases, except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties. Any person having the right to redeem any property sold to the State for taxes, and who desires to redeem under the provisions hereof, shall, before January 1, 1938, make application to the State Land Commissioner and to the Probate Judge of the County where the real estate is situated, and shall deposit with the Probate Judge one-fourth of the amount of accrued taxes without interest and penalties and annually thereafter, shall pay one-fourth of said sum to the Probate Judge until the whole amount required has been paid, and thereupon certificate of redemption shall be issued as in other cases.

"Section 2. All laws and parts of laws in conflict with the provisions of this Act are hereby expressly repealed.

"Section 3. This Act shall go into effect immediately upon its passage and approval by the Governor.

"Approved February 3, 1937."

In construing said Act, and former legislation dealing with similar methods of redemption of said Act, the opinions of this office are predicated on the theory that title has not passed out of the State.—**Quarterly Report of Attorney General Vol. VII, p. 262; Quarterly Report of Attorney General, Vol. IV, p. 151.** The first opinion cited outlines the legislative history of the Acts under consideration.

Our Supreme Court in the case of **Union Central Life Insurance Company v. State**, 226 Ala. 420, 147 So. 187, held that where lands are bid in at a tax sale and subsequently a certificate of assignment is issued according to statute, such assignment vests in the assignee or his legal representative the right and interest evidenced by the certificate of the original purchaser, whether that purchaser at the tax sale was the State or a third party.

The only reasonable and logical deduction from a careful reading of the statutes involved and the opinions construing same is that Act No. 81,

supra, applies only in cases where the State has not parted with its title either by an assignment of the certificate of purchase or a deed from the State Land Commission. In either the purchaser pays interest to the State. To hold otherwise would require a purchaser from the State of lands bid in by the State to pay interest and then let one, who has the right to redeem, redeem said property without the payment of interest or the refunding of the interest paid.

The above construction does not nullify the provisions of Acts 1935, p. 1112, which protects the rights of the holder of a recorded mortgage. Said Act has a field of operation in redemption from the State under Act No. 81, supra.—See Quarterly Report of Attorney General, Vol. VII, p. 262, supra. It also has a field of operation in regard to the methods of redemption from individuals in accordance with the statutes pertaining specifically thereto.—See Quarterly Report of Attorney General, Vol. IV, p. 151, and opinions cited.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Licenses—A person engaged in the business of selling at wholesale from trucks to retailers for resale bottled fruit juice drinks, non-alcoholic and non-carbonated, must pay the State license levied by Schedule 129 of Section 348 of the 1935 Revenue Act on wholesale dealers of non-alcoholic, non-carbonated or other soft drinks, and one half of the amount of said license to the county, in each county in which he so engages in business, and must also pay the regular transient dealer's license levied by Schedule 147 of Section 348 of the 1935 Revenue Act of \$30.00 to the State in one county and \$5.00 to each county in which he so engages in business.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter as follows:

"I have a request from a Mobile concern for a license to sell at wholesale from their trucks, bottled fruit juice drinks, non-alcoholic and non-carbonated. These drinks are put up in Mobile County. The applicant has purchased wholesale soft drink license in Mobile County. He does not state whether he is paying a Bottler's license and it seems that he has not purchased a State Transient Dealer's license. The 1935 Revenue Code, many parts of it, is beyond my comprehension. Please

advise what license this concern must purchase in Conecuh County in order to sell at wholesale, drinks manufactured by them, in this county."

First, it should be stated that persons dealing in bottled fruit juice drinks, non-alcoholic and non-carbonated, are subject to the appropriate license levied on the various classifications of dealers in non-alcoholic, carbonated or other soft drinks, even though the fruit juices are non-carbonated. See opinion of the Attorney General to Hon. G. W. Robertson, Judge of Probate, Baldwin County, Bay Minette, Alabama, under date of March 4, 1937. Quarterly Report of the Attorney General, Vol. II, p. 257.

Inasmuch as the person described in your letter of inquiry has paid a wholesaler's license, that is, the license levied by Schedule 129 of Section 348 of the 1935 Revenue Act on persons engaged in the business of selling at wholesale, non-alcoholic, carbonated or other soft drinks, in Mobile County, it is safe to assume that he is not a bottler of soft drinks, or he would not have been subject to the payment of the license levied by Schedule 129, because of the exemption of bottlers from said license contained in said schedule. Therefore, our opinion will treat the applicant for license as merely a person engaged in the business of selling at wholesale from trucks to retailers for resale bottled fruit juice drinks and not as a bottler of said drinks.

The license on persons engaged in the business of selling at wholesale non-alcoholic, carbonated or other soft drinks is levied by Schedule 129, supra, which reads as follows:

"Each person engaged in the business of selling at wholesale non-alcoholic, carbonated, or other soft drinks, shall pay an annual license of Fifty Dollars (\$50.00). Provided that bottlers who have taken out bottle license for operating plants in this State shall not be liable under this Schedule, nor shall such bottlers be liable for any county or state license under Schedule 146 hereof, nor as transient vendors or dealers or peddlers."

Subsections (a) and (b) of Section 350 of the 1935 Revenue Act provide:

"(a) Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided. (b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

Therefore, such a person must pay the license levied by Schedule 129 and one-half of that amount to the county in each county in the state in which he so engages in business. This notwithstanding the fact that it might be said that he actually has no fixed or established place of business in any county in the state, for it may be said that he has a place of business in each county in which he so deals. Cf. Opinion to Hon. W. G. Little, Judge of Probate, Sumter County, Livingston, Alabama, under date

of November 29, 1935, Quarterly Report of Attorney General, Vol. I, page 255 and opinion to Hon. Roy Sanderson, Judge of Probate, Marion County, Hamilton, Alabama, under date of June 14, 1938, a copy of which is enclosed herewith for your information.

Said person is also liable for the regular transient dealer's license levied by Schedule 147 of Section 348 of the 1935 Revenue Act which reads in pertinent part as follows:

"Each person doing business as a transient dealer as defined in this schedule and who does not pay privilege license under Schedule 33, or the license permit under Section 159.16 shall pay an annual license tax to the state of \$30.00. The payment of one state license shall authorize such transient dealer to engage in such business in any county in the state upon the payment of county license of \$5.00 in each county."

Then follows the definitions of transient dealers. It is not necessary to here set out all those definitions to show that the person engaged in business in the manner described in your letter of inquiry is a transient dealer. He certainly is engaged in the business of going from dealer to dealer and selling goods, wares and merchandise for resale by a retailer, which brings him within the definition of the term "transient dealer" contained in subsection (b) of said schedule, which reads as follows:

"All persons acting for themselves or as an agent, employee, salesman, or in any capacity for another, whether as owner, bailee or other custodian of goods, wares, and merchandise, and going from person to person, dealer to dealer, house to house, or place to place, and selling, or offering to sell, exchanging or offering to exchange, for resale by a retailer, any goods, wares and merchandise."

That he is liable for the license levied by this schedule notwithstanding the fact that he is also liable for the license levied by Schedule 129 is made very clear by the provisions of Section 357 of said Act which reads as follows:

"Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

It might be well to here point out that the special license on transient dealers in bakery products and soft drinks in any county other than the county where the person maintains his bakery plant or bottling plant, as the case might be, of \$20.00 and \$5.00, which is levied by subdivision 3 of subsection (k) of Schedule 147, is not here applicable, since it applies only to transient dealers in soft drinks who are also bottlers thereof, if it has any application to transient dealers in soft drinks at all, in view of the exemption of bottlers from licenses other than the license levied by Schedule 26, which is contained in Schedule 129. Since this provision could not be applicable to the person described in your letter of inquiry, he not being a bottler, it is not necessary for us to decide, and we do not decide, the question

of whether or not this provision contained in subdivision 3 of subsection (k) of Schedule 147, supra, prevails over the exemption contained in Schedule 129, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

Constitutional Law—Courts of County Commissioners—

1. Local statute changing compensation of members of Courts of County Commissioners from that provided by general law, is unconstitutional.

2. Local statute changing compensation of Probate Judge as member of the Court of County Commissioners from that provided by general law, is unconstitutional.

3. Local statute changing form of county governing body from Court of County Commissioners to County Board of Revenue or like tribunal and providing that chairman shall be other than a probate judge, and providing compensation for such chairman different from that provided by general law for the probate judge for similar services in connection with Court of County Commissioners, is not constitutionally invalid as violative of Subdivision 24 of Section 104 nor of Section 105 of the Constitution.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"1. Is a local law, passed since the adoption of the 1901 Constitution, wherein the compensation of the four commissioners is fixed on a different basis of pay from the compensation as provided for by the Code, constitutional?

"2. Is a local law, passed since the adoption of the 1901 Constitution, wherein the compensation of the Judge of Probate for services in connection with such Commissioners' Court is fixed on a different basis of pay from the compensation as provided for by the Code, constitutional?

"3. When by local legislation the Commissioners' Court, as created by the General laws, is abolished and another governing body is estab-

lished wherein the Chairman is a person other than the Probate Judge and the compensation of the Chairman is fixed by such local legislation, is that part of such law constitutional?"

Your first inquiry must answered in the negative. **Carnley v. Moore**, 218 Ala. 274.

In that case the Supreme Court had under consideration a local act passed at the 1927 Session of the Legislature (Local Acts of 1927, page 395) which undertook to change the compensation of the Commissioners Court of Coffee County from that provided by general law. The Court said:

"The provisions of the act, under which salary, fees, or compensation of petitioner is sought to be compelled of payment by mandamus or as a local act, are violative of section 96 of the Constitution denying the right of the Legislature to enact a law not applicable to all the counties of the state, regulating costs and charges of courts, or fees, commissions, or allowances of public officers, *Birmingham Elec. Co. v. Harry*, 215 Ala. 458, 111 So. 41; *Vaughan, Judge of Probate v. State ex rel Barker*, 212 Ala. 461, 103 So. 38, and was an allowance to a public officer within the inhibition of subsection 24 of section 104 of the Constitution, *Brandon v. Askew*, 172 Ala. 160, 54 So. 605; *Osborn v. Henry*, 200 Ala. 353, 76 So. 119; *Jackson, Clerk v. Sherrod*, Dep. Sol., 207 Ala. 245, 92 So. 481.

"The claim or compensation sought by the official was likewise offensive to the provisions of sections 68 and 281 of the Constitution, being in the nature of an increase of the county official's compensation during the 'term of office', *Stovall v. City of Jasper* (Ala. Sup.) 118 So. 467; *City of Birmingham v. Hawkins*, 208 Ala. 79, 94 So. 62; *McMurray v. County Board of Education*, 216 Ala. 144, 112 So. 644, and different from that in other counties."

The conclusion of this case inescapably is applicable to the question stated in your first inquiry.

By analogous reasoning, **Carnley v. Moore**, *supra*, is applicable to the question posed in your second inquiry, and the same necessarily must be answered in the negative.

Your third inquiry is general and difficult of accurate answer. As I interpret it, you have in mind the case where the Legislature abolished the existing Court of County Commissioners presided over by the Probate Judge of the county and established a Board of Revenue or governing body of like nature in which is vested all the powers vested by general law in courts of county commissioners; and fixes the compensation of the chairman of such newly created tribunal at a rate different from that provided by general law for the Probate Judge when performing like services in connection with a Court of County Commissioners. On authority of the case of **Dunn v. Dean**, 196 Ala. 486, your third inquiry must be answered in the affirmative.

In that case the Supreme Court had under consideration a local act (Local Acts 1915, page 293, et seq.) which undertook to establish a Board of Revenue for Conecuh County and to abolish the Court of County Commissioners then existing in such county. The act provided that the county should be divided into five defined districts and the election of a member of the Board for and

by the qualified electors in each of the five districts, and apportioned the terms of the members so that said terms should not all expire at the same time. It also provided that the members of said board should elect the president thereof; and it provided for his compensation.

The Act was attacked, upon the ground, among others, that it was violative of Subdivision 24 of Section 104 and of Section 105 of the Constitution. Speaking to the first objection, the Supreme Court held:

"The local act under review relieved the judge of probate of certain duties that were but incidental to the service of that office and that officer, and, in consequence of the abolition of these duties, took from him (to be subsequently elected) the compensations theretofore allowed the judge of probate for these merely incidental services. Hence, the act under consideration did not, in any direct, primary sense, create, increase or decrease the fees, percentages or allowances of a public officer. The subdivision quoted is not offended by this act."

As to the latter objection, the Supreme Court said:

"The local act mentioned is assailed as constitutionally invalid, under Section 105, because the subject-matter was, at the time of its approval, already provided for by the general law approved February 26, 1903. * * *

The subject matter of each act, the general and the local, is substantially the same; the latter being more ample in legislatively fixed detail of accomplishment of the purpose common to both acts. In *Green v. State*, 143 Ala. 2, 7, 8, 39 South, 362, 364, it was said: "The general law was different from this, requiring a special venire for each capital case. The relief sought by this amendment could not be obtained under any general law then existing or the local law as stated would have been unnecessary. It in no sense, therefore, offends that provision of the Constitution (Section 105) which prohibits the Legislature from enacting any special or local law by the partial repeal of a general law". * * *

"It creates a body constituted of members separately chosen by the electorate of separate districts, thus excluding the judge of probate who, under the general law, was the presiding officer of the commissioners' court. This departure from a body the members of which were chosen by the electorate of the whole county, and for terms of four years (aside from the judge of probate who is chosen for a term of six years), to a body the constituents of which are elected by and from districts only, and for terms so ordered and arranged as to prevent the expiration of the terms of all the members at one time, are radical and, in proportion to the subject, superlative changes from the status fixed by general law to a status not contemplated or provided for by general laws. Our opinion, therefore, is that this act is not offensive to the quoted provisions of section 105 of the Constitution. We are advised of no provision of the Constitution that inhibits the Legislature from creating a county governing body as the result of elections of its members by the electorate of defined districts."

Although the act considered in the *Dean* case did not provide compensation for the president of the Board of Revenue thereby established different

from that provided for the Probate Judge for like services in connection with the Court of County Commissioners under the general law, it is my opinion that the principles enunciated in that case, when applied to the facts stated in your third inquiry, resolve the question in favor of the constitutional validity of such an act.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Filing Tax—The fact that a mortgage is insured by the Federal Housing Administration does not exempt it from mortgage filing tax.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of recent date as follows:

"I have had filed in my office for record a mortgage made to the First National Bank of Montgomery, Alabama, as Trustee for a certain named individual.

"The mortgage is insured by the Federal Housing Administration.

"I am familiar with the rule that the mortgage tax is not applicable to mortgages executed to National Banks, but I desire to know whether the ruling shown in O. A. G. 1932-34, on page 46 would be applicable to the instant case. Please let me have an opinion on this matter at once."

As you state in your request, this department has held that a mortgage is subject to the mortgage tax before filing, where a national bank is the mere trustee. 1932-34 Opinions of Attorney General at page 46.

I am of the opinion that the fact that the mortgage is insured by the Federal Housing Administration would not exempt it from taxation, and that you should require the payment of the mortgage tax before accepting the mortgage for filing.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Sales Tax—Cottonseed meal used for fertilizer is not subject to sales tax.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

I have your request for reconsideration of a recent opinion of this office appearing in Quarterly Report of the Attorney General, Vol. IX, page 29, construing the Sales Tax Act in its application to cottonseed meal procured by farmers in exchange for cotton seed grown by them, which said cottonseed meal was procured for use as a fertilizer, or as ingredient thereof.

The inquiry dealt with in the opinion, *supra*, was addressed specifically to cottonseed meal **procured to be used as a fertilizer**. However, I understand from your request that certain dealers in cottonseed meal have undertaken to construe the opinion, *supra*, as a pronouncement that all cottonseed meal, for whatever purpose procured, is exempt from the Sales Tax Act.

In view of the situation reflected in your letter, I have decided to extend the opinion for the purpose of making it absolutely clear that it was applicable only to sales and exchanges of cottonseed meal procured for use as a fertilizer or as an ingredient thereof. Pursuant thereto, the opinion is being amended and extended to read as follows:

"This is to acknowledge your request for opinion as follows:

"I wish to have your opinion on the following matter as early as possible due to the fact that our ginning season is near at hand:

"1. Quite a lot of cottonseed meal is used as a fertilizer and since fertilizer is exempt from the two per cent Sales Tax please advise if cottonseed meal bought to be used as fertilizer is also exempt.

"2. The custom has grown in the County and also in other counties over the State of swapping cottonseed at the gin for meal. The ginner takes the seed and swaps them to the oil mill for the meal and in turn swaps the meal to the farmer for his seed. Sometimes the swap is even. Sometimes they will give the farmer more than a ton of meal for a ton of seed and sometimes less, due I presume to the market price of cottonseed oil. Since cottonseed is exempt from the sales tax, please advise if the ginner will be permitted to make the exchange with the farmer without collecting a sales tax on the meal'."

"Act No. 126, General Acts, 1936-37, page 125, generally known as the Sales Tax Act, provides the tax to which you refer. Section 4 (c), however, exempts from the provisions thereof the sale of quite a number of articles among which are unprocessed cottonseed and fertilizer.

"It is a matter of common knowledge that in Alabama cottonseed meal exchanged by the ginner for the farmers' cottonseed is used primarily for fertilizer. Therefore, in view of the specific statutory exemption, it is my opinion that the sale or exchange of cottonseed meal procured for use as a fertilizer, or as an ingredient thereof, is not subject to the Sales Tax. Your inquiry must be answered in the affirmative."

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. B. T. Prince,
Tax Assessor,
Lee County,
Opelika, Alabama.

Taxation—No authority for Board of Review to consider tax assessment after the close of the tax year in which said assessment is made, unless impeached for fraud or lack of jurisdiction.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of February 23, 1938, in which you request my opinion as follows:

"Is there any law under which the Board of Review has the right to take up for consideration at this time the tax value of any real or personal property for the tax year 1937? In other words would the Board of Review have the right to consider a complaint rendered at this time concerning the tax value of any property for the tax year 1937?"

"The Board of Review of this (Lee) County has authorized me to get your opinion in this matter."

In reply, I wish to advise you that in my opinion your inquiry must be answered in the negative, unless impeached for fraud or lack of jurisdiction. I assume that you mean by the statement in your letter, viz, "The tax value of any real or personal property for the tax year 1937", taxes due and payable as of October 1, 1937.

In my judgment the assessment of taxes and valuation of property when once made by the duly constituted authorities is judicial in its nature and unless impeached for fraud or lack of jurisdiction, or unless refused appellate authority, it is final. See *State v. Doster-Northington Drug Co.*, 196 Ala. 450; *Anniston Land Co. v. State*, 185 Ala. 482, 487, 64 So. 110.

In my judgment, no authority exists to re-open a tax assessment which has become final by the closing of the tax year, when it is agreed to or

acquiesced in by the failure of the taxpayer to raise any question as to its correctness before the close of the tax year. I refer you to the case of **Doster-Northington Drug Co. v. State**, supra, wherein the court said:

"The reasonable construction of the power of assessment of taxes, and the review thereof, should be to the end that a stable and uniform system prevail in the state; and so when annulment or review is not sought within the period of the tax year, that matured assessments shall be binding alike on the taxpayer, and on the taxing authority."

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. Joe O. Brooks, Chairman,
Board of Revenue of Conecuh County,
Conecuh County,
Evergreen, Alabama.

Counties—May rent out idle tractors and road machinery at a reasonable rent, the proceeds of such rent to be paid into the fund out of which the tractors and machinery was purchased.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of November 23, 1937, in which you request my opinion as follows:

"Can Conecuh County, Alabama, and its Board of Revenue lawfully rent out their tractors and road machinery, which is now lying idle and doing nothing on the roads of the County, to the Farm Demonstration Agent of the County, or to Farm Organizations, or Farmers within the County for the purpose of preventing soil erosion, by terracing the lands of farmers within the County, provided a reasonable and proper rent for the use of such road machines is paid to the County, especially now when the farms are idle and before planting time begins next year."

I am of the opinion that your inquiry should be answered in the affirmative provided that the rent is sufficient to care for any depreciation caused by the use of the rented tractors and machinery by the parties to whom they are rented. The proceeds received from the rent should be deposited to the fund out of which the tractors and road machinery in question were purchased.—**Biennial Report of Attorney General, 1926-1928, p. 368.**

There is no objection, in my judgment, to the above procedure provided that the machinery in question is not being used by the county in its road and bridge work. The renting out of the tractors and road machinery even to private individuals, when such is not being used by the county, would not,

in my opinion, amount to an appropriation of public funds to private individuals. The individual is paying value received for the privilege of using the tractors and machinery and the county is receiving a benefit therefrom.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. James H. Tompkins,
County Solicitor,
Colbert County,
Tuscumbia, Alabama.

Rabies Inspector—

Power of removing duly appointed and approved Rabies Inspector vested in County Board of Health.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter as follows:

"I would like to have a ruling by the Attorney General on the following question. 'Under Section 2, of the Anti-Rabies Act of 1937, can a new Rabies Inspector be nominated without first disposing of the one duly appointed and approved in accordance with said section?'"

"The facts are these:—

"The Rabes Inspector for this County, was nominated and appointed in 1937 in accordance with said section. Under said section, his term of office is not stated and he can only be removed for cause.

"On the first day of January, 1938, the Colbert County Health Department was instructed by the State Health Department, in Montgomery to have a new Rabies Inspector nominated and appointed.

"Since there is no provision for such action in said Act, I would like to have an opinion on the legality and authority of such action."

The statutory provisions covering the appointment and removal of Rabies Inspectors are found in Section 2 of Act No. 200, General Acts, 1936-37, page 230, approved March 2, 1937. Said section reads as follows:

"Section 2. ENFORCEMENT PROVISION. For the purpose of providing proper enforcement of the provisions of this Act, each County

Board of Health is hereby invested with general supervisory powers, and it shall be its duty, with the approval of the State Health Officer and the State Veterinarian, to designate or appoint, within ninety days of the passage and approval of this Act, a competent Veterinarian or other person properly qualified, who shall be known as the Rabies Inspector, and such Inspector may select as many deputies to aid him in such enforcement as he may desire. It shall be the duty of the said Inspector, under the direction of the County Board of Health, to enforce the provisions of this Act, and it shall be his duty to inoculate dogs or have the work done by his deputies when called upon to do so, and for the full enforcement of the provisions of this Act, the said Rabies Inspector, and his deputies are hereby clothed with full police power, and the sheriff and his deputies in each county and the police officers in each incorporated city are hereby designated as aids, and instructed to cooperate with said Inspector in carrying out the provisions of this Act. The compensation of the Inspector and his deputies shall be limited to the fees prescribed in succeeding sections of this Act. The said Rabies Inspector may be removed from office, for cause, by the County Board of Health." (Emphasis ours).

It can be seen from a reading of the above quoted section of said act that the duty of appointing a Rabies Inspector is placed on the County Board of Health and that the appointment so made by the County Board of Health must be approved by both the State Health Officer and the State Veterinarian. When a person is so appointed by the County Board of Health and is duly approved by both the State Health Officer and the State Veterinarian, he becomes the duly appointed and approved Rabies Inspector.

The last sentence of said section very clearly places the power of removal in the County Board of Health, which is the original appointing power. Therefore, it is my opinion that a duly appointed and approved Rabies Inspector may be removed from office for cause only by the County Board of Health, and that the State Health Department, the State Health Officer, and the State Veterinarian, are without power or authority to remove such an Inspector.

Of course, if the State Health Department is of the opinion that a particular Rabies Inspector is not satisfactorily discharging his duties, it could make this fact known to the County Board of Health with a request that the County Board of Health remove the Rabies Inspector. However, in such a case the questions of whether or not there was cause for removing the Rabies Inspector from office and whether or not he should be removed address themselves to the County Board of Health and not to the State Health Department.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

June 25, 1938.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Attention of Mr. Simon Wampold.

Taxation—Redemption—

County not required to make certification required by Section 276 of the Revenue Laws of 1935, as amended, where lands are sold by the State under Section 281 of the Revenue Laws of 1935, under facts stated.

Opinion by Attorney General Loeb.

Dear Sir:

I have your letter of April 9, 1938, requesting my opinion as follows:

"June 28th, 1923, property sold by the Tax Collector of Montgomery County for taxes and penalties for 1922 bought in by the State of Alabama. In 1936 the owners of this property came into the office of the Judge of Probate to redeem said lands from said land sale. This office figured taxes plus interest from the date of sale to the date of redemption together with interest on all subsequent years' taxes. It was the contention of the owner that the amount was excessive and he did not redeem, but subsequently went to the State Land Commissioner, and the State Land Commissioner on August 12th, 1936, sold this property back to the owners for the actual amount of the tax eliminating all interest charges, and gave the owners four years in which to make the payments. The State Land Commissioner then submitted to this office \$451.67 less \$45.17, being 10% commission to the Land Agent as the County and School part for Montgomery County, and in order for this office to receive this amount of money it was necessary to fill in and sign the following certification:

'I, Judge of Probate of said County do hereby certify that the amount of County Tax, School Tax, Fees and Costs due upon said real estate under Sections 281 and 288, House Bill 324, approved July 10, 1935.'

this to be signed by the Probate Judge. This office at this time did not sign, holding that this was a redemption being made through the State and not through the Probate Judge, and while Probate Judge was willing to accept this money and distribute it according to instructions from the State, but was not willing to sign the certificate and there the matter remained, status quo.

"Now, under date of April 7th, the State through the Land Commissioner again tendered what is purported to be the second payment and we again refused to sign the certification, that this is the amount of taxes and costs due on said real estate as provided by law, and the State Land

Commissioner informs us that this money is deposited with the State Comptroller to the credit of the County and can only be secured for the County if and when the Judge of Probate signs the following:

'I, Judge of Probate of said County, do hereby certify the amount of County taxes, school taxes, Fees and Costs due upon said real estate as provided by law is and that said amount for County and School Taxes and interest less 10% for Land Agent's commission and naming the amount.'

"This office being unable to determine the correctness of these figures and not wishing to be a party to a transaction except to receive and distribute the money, would like an opinion from your office. Is it necessary in order to obtain this money from the State that the Judge of Probate sign the certification set out on the distribution sheet, and if under the law he is authorized to do this when he does not receive the full amount of taxes due the State or the full amount for which the State proceeding under Section 281 has sold the property, not to a third party but to the original owners?

"We would thank you to go into this matter and let us know under what Section of the Code to proceed as we cannot find any Section that provides for the Judge of Probate to certify to a partial payment from the State Land Commissioner."

You state that the property in question was sold by the State Land Commissioner under the provisions of Section 281 of the Revenue Laws of 1935, (Simon's Revenue Compilation, p. 135) which section provides as follows:

"Section 281. When real estate which has heretofore been sold for taxes and bought in by the State and the period of redemption has expired the State Land Commissioner with the approval of the Governor, may sell all the right, title and interest of the State to such real estate at the best price obtainable and upon such terms as he may determine. Provided, such amount shall not be less than the taxes due thereon for a period of three years, without interest, costs or penalties. (b) Provided, However, that where real estate has been sold for taxes and bid in for the State and not redeemed within five years from date of sale the State Land Commissioner shall have the right to sell the right, title and interest of the State to such real estate at the best price obtainable, irrespective of the amount of taxes due, and upon such terms as he may determine. The provisions of this subsection shall apply to real estate heretofore sold for taxes and bid in by the State and also shall apply to real estate that may be hereafter bid in for the State at tax sales."

You will note from the foregoing section that where real estate has been sold for taxes and bid in by the State and not redeemed within five years from date of sale, as is the case under the facts detailed by you, the State Land Commissioner has the right to sell the property under such terms as he sees fit. In this particular case it appears that he sold the land in question for the total amount of the taxes due less interest and penalties, the price to be paid in four yearly installments.

Under the foregoing circumstances, it is my opinion that the State Comptroller is authorized to draw his warrant on the State Treasury in favor of

the Judge of Probate of the county in which the lands lie, for the county and school taxes and the fees and costs due to the different officers of the county, upon certification of the amount received from such sale by the State Land Commissioner. The certification by the State Land Commissioner should be made under Section 288 of the Revenue Laws of 1935 which provides as follows:

"Section 288. When lands bid in by the State have been sold by the State under any of the provisions of this chapter, the State Land Commissioner shall certify to the State Comptroller the amount and the State Comptroller shall draw his warrant on the State Treasurer in favor of the judge of probate of the county in which the lands lie, for the county and school taxes, and the fees and costs due to the different officers of the county, specifying each separately; and if the same cannot be ascertained from the records and papers in his office, the judge of probate, on notice by the State Land Commissioner of such redemption or sale, must certify the same to him and the judge of probate, upon the collection of such warrant, shall pay the same over to the officers entitled thereto, or authorized by law to receive the same."

You will note, however, that if the amount to be received by the said agencies cannot be ascertained from the record and papers in the Land Commissioner's office, then it becomes the duty of the Judge of Probate upon request of the State Land Commissioner to certify same to him.

However, under the facts detailed in your letter, it appears that the State Land Commissioner must, under Section 288, supra, certify the facts to the State Comptroller who must thereupon draw his warrant as required by said Section 288 and there is no duty upon the Judge of Probate to sign the certification mentioned in your inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 25, 1938

Hon. H. A. Terry, Chairman,
Board of County Commissioners,
Hale County,
Greensboro, Ala.

1. Court of County Commissioners may appropriate proceeds of sales tax for the eradication of Bang's disease, provided the same is in cooperation with the State Board of Health or the Federal Government and is approved by the State Board of Health or the Federal Government.

2. Court of County Commissioners may appropriate county's share of Alabama Beverage Control Act receipts to the general fund for the eradication of Bang's disease, provided the County Health Officer, the County Board of Health and the Court of County Commissioners deem the same to be a public health measure.

3. Court of County Commissioners may appropriate county's share of Alabama Beverage Control Act receipts to be used exclusively for public health, etc., for the eradication of Bang's disease if, in its opinion, the same is a public health measure.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 5, 1938, in which you request my opinion as follows:

"A court of County Commissioners passed a resolution authorizing the county to expend a sum not to exceed \$500.00 for the eradication of Bang's disease, (contagious abortion) and they have instructed me to ask you for a ruling as to where they can pay this from the Sales Tax and Liquor Tax Funds, as this disease is considered by the medical profession, as causing undulant fever in the human race and is considered also by the Health Department as a health measure."

Your letter draws no distinction between proceeds of the sales tax and proceeds from the Alabama Beverage Control Act. However, under the law there is a difference between the purposes for which the County's proceeds under the respective acts may be used. I will, therefore, treat the questions separately.

1. Speaking first to the question of whether or not the proceeds of the appropriation in question can be paid from the sales tax fund, I wish to call to your attention Section 21 of the Sales Tax Act, which reads in pertinent part as follows:

"* * * provided that the funds divided and distributed to the several counties of the State as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the State and/or the Federal Government, for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension service in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the Commissioners Court, Boards of Revenue, or other governing bodies of the several counties of the State."

In *Tuscaloosa County vs. Chester Walker*, 178 So. 543, it was held by the Supreme Court, in construing Section 21, that the state agencies mentioned therein, and not the various county governing bodies, were to exercise their judgment as to whether or not the expenditures by the various counties from the Sales Tax Fund were within the meaning of the term "public health."

The following quotation from the Tuscaloosa County case is submitted as an answer to your inquiry:

"Clearly, therefore, when the Legislature, in Section 21, *supra*, speaks of expenditure of these funds in cooperation with the county authority, it was not meant that the latter could exercise its own discretion as to the wisdom of such expenditures, and its own judgment as to what in

fact was embraced within the influence of the activities of these various governmental agencies. We think the discretion referred to as resting in the county authority was the ascertainment of the purpose or purposes for which the funds were to be expended.

"Thus the county maintains its own initiative and autonomy in determining the purpose or purposes for which the money is to be expended. But we think it equally clear that it was the legislative intent that these State agencies were to exercise their judgment as to whether or not the expenditures were within the meaning of the terms 'public health', 'public welfare', and 'agricultural extension service.'

"There is no just criticism that such construction given the State control of county funds, but it merely places upon the county the restraint of a guiding hand trained and experienced, concerning the funds the State has allocated to the counties for definite purposes."

You will see from the foregoing that while the county may determine that it desires to expend money for the eradication of Bang's disease, and the amount to be so expended, before the sales tax fund may be used for this purpose it is necessary that the State Health Department or the Federal Government approve the expenditure as being within the meaning of the term "public health."

2. The next question is as to the use of the county's share of the Alabama Beverage Control Act receipts for the purpose set out in your letter. The county's share of the Alabama Beverage Control Act receipts is divided into two classes, in so far as the use which can be made of the same is concerned, part of the same going to the general fund of the county and the other part to be used exclusively for the purposes of Public Health, Old Age Pensions and for other purposes of the County Departments of Public Welfare.

The following are pertinent provisions of the act in regard to the county's share of the Alabama Beverage Control Act receipts going to the general fund.

Section 9 (c) of said Act, which is the section providing for the division of the net profits derived from the proceeds of the State Liquor Stores under the provisions of said Act, reads in pertinent part as follows:

"* * * Ten percent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds * * *;"

Section 12 of said Act provides in part:

"All license fees collected under this Section shall be collected by the Board for the use of the county in which such licenses were levied and in which the applicant's place of business is located, and shall be paid over to said county at quarterly intervals."

Section 22 (7) of said Act reads in part:

"License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied."

All of these receipts go to the general fund of the county.

Sub-section 12 of Section 1058, Code of Alabama, 1923, as amended by Act 443, General Acts 1935, p. 918, approved September 13, 1935, provides in pertinent part as follows:

"The Court of County Commissioners or other like body * * * may in its discretion appropriate from the revenues of the county, money for the prosecution of public health work, which has been recommended by the county health officer and endorsed by the County Board of Health and approved by the said Court of County Commissioners, or other like board."

The reference in said subsection of Section 1058, as amended, supra, to the "revenues of the county" means, of course, "the general fund of the county." **Weaver vs. Tidwell**, 288 Ala. 169. Therefore, if the County Health Officer and the County Board of Health and the Court of County Commissioners deem the eradication of Bang's disease to be a health measure, under the provisions of said subsection of Section 1058, as amended, supra, the county's share of the Alabama Beverage Control Act receipts for the general fund may be used for such purpose.

The other provision in regard to the use of the county's share of the Alabama Beverage Control Act receipts is found in the following excerpt from Section 9 (c) of said Alabama Beverage Control Act:

"* * * ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties, and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Departments of Public Welfare; * * *"

Since there is no requirement in this provision that the funds to be used for the purpose of public health etc., must be used in cooperation with, or approved by, the State Board of Health or the Federal Government or the County Health authorities, and the Court of County Commissioners has general supervision over the expenditure of all county funds, except as limited by statute, it is my opinion that this part of the county's share of the Alabama Beverage Control Act receipts may be used for the purpose mentioned in your better of inquiry, provided that the Court of County Commissioners is of the opinion that the same is for a public health purpose.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

June 29, 1938

Department of Public Health,
Montgomery, Alabama.

Attention: Dr. Douglas L. Cannon.

1. Lien of municipality for installing a septic tank under Code Section 2051 not transferable.

2. Municipality not entitled to collect interest on amount of such lien.

Opinion by Assistant Attorney General Garrett.

Gentlemen:

I have your letter of April 27, 1938, in which you request my opinion as follows:

"Attached hereto is Section 2051 of the Code of Alabama of 1923, as amended by the Acts of 1927, and as amended by the Acts of 1935, being so amended and passed in the Legislature during the regular session of 1935.

"We request your opinion on the following:

"1. When a municipality acquires a lien against a property by installing a water closet, a privy, or a septic tank under the provisions of Section 2051 of the Code of Alabama of 1923, as amended by Acts of 1927, and as amended by Acts of 1935, is the lien acquired by the municipality transferable to any person, firm or corporation?

"2. In the collection of the aforementioned lien, does the municipality have legal right to charge and collect the legal rate of interest on the amount of the acquired lien?

"3. Presuming that the aforementioned lien is transferable by the municipality to any person, firm, or corporation, does the person, firm, or corporation have legal right, in the collection of the lien to charge and collect the legal rate of interest on the amount of the lien so acquired from the municipality?"

Under the statute in question, as amended, the city or town may install such septic tanks as it deems advisable and make proper connections, "the expense of same to be assessed against the property, and the cost thereof to be a lien upon the property in favor of the city or town, superior to all other liens to be collected as other debts are collected or liens enforced."

Municipal power is delegated power derived from, and part of, the legislative power of the state. **Mitchell v. City of Birmingham**, 222 Ala. 389, 133 So. 13. In the absence of express legislative enactment, a taxation or assessment lien of a municipal corporation is not transferable or assignable. 61 C. J. 948. The system of farming out taxes or selling the right to collect taxes

and assessment liens, prevalent some centuries ago, is now opposed to a long settled policy of this state. While under Section 2223 of the Code of Alabama of 1923, municipal corporations are given the right to issue bonds or to borrow money for public improvements, that power is limited to providing funds to pay the cost of improvements made pursuant to Article 33, Chapter 43 of the Code. It results, therefore, that this statute permitting the assignment of liens for municipal improvements such as streets, sidewalks and sewers is not broad enough to include the particular municipal improvement here involved. It is, therefore, my opinion that the municipality has no authority to transfer any lien acquired by it under the provisions of Section 2051 as amended.

2. Your next question is whether the municipality has the legal right to collect interest on the amount expended by it for the benefit of the property owners for which amount it acquires a lien pursuant to the above named statute.

Assessments for public improvements are in the nature of taxes. In 44 C. J. 481, par. 2807, we find the following statement on this subject:

"It is very generally held that special assessments or special taxes to pay for local improvements are not taxes in the ordinary sense of the term. They are not taxes within the meaning of the term as generally understood in constitutional restrictions and exemptions. Nevertheless, it is equally well settled that the power to levy special assessments and taxes for local improvements is not an exercise of the power of eminent domain; that special assessments and special taxes are at least in the nature of a tax, because they must be levied for a public purpose, and because they are an enforced contribution on the property owner for the public benefit; **that the levy thereof is an exercise of and referable to the taxing power**, and an attribute of sovereignty; and that a municipality imposing assessments on property benefited does not act as agent of the owners assessed." (Emphasis ours).

In support of the emphasized portion of the above quoted statement, there is cited, among a long list of cases from other jurisdictions, the case of **Bradford v. Huntsville**, 215 Ala. 591. In that case, Mr. Justice Sayre of the Supreme Court spoke to this question as follows:

"That the right to assess abutting property for the cost of a local improvement involves an exercise of the taxing power cannot be denied. *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 S. Ct. 625, 45, L. Ed. 379; *Ford Dillon Mun. Corp.* Section 1431. This, the cases decided by this court do not deny or question."

To like effect is the following statement from the case of **Stovall v. City of Jasper**, 218 Ala. 282:

"The power delegated to municipalities to assess the cost of public improvements against the property benefited and within the class is a legislative taxing power, * * *"

Thus, it may be said that this assessment for the public improvement here under consideration is a tax, or at least in the nature of a tax.

We then must decide whether or not the municipality has the legal right to collect interest on such an assessment or tax. It is well settled in the state courts that, in the absence of a specific statute so providing, interest is not recoverable on taxes. In 61 C. J. 1515, par. 2218, we find the following statement on this subject:

"The state and territorial courts * * * have held that interest is not recoverable on delinquent taxes due the state, or territory, or a political subdivision thereof, unless it is expressly so provided by statute, basing their decisions on the grounds that an obligation to pay taxes is not founded on contract, express or implied, or that a tax is not a debt." (Emphasis ours).

Cited in support of the emphasized portion of the above quoted statement is the Alabama case of *Perry County v. Selma, Marion & Memphis, R. R. Co., Hale County v. Selma, Marion & Memphis R. R. Co.*, 65 Ala. 391.

To like effect is the Mississippi case of *Illinois Central R. R. Co. v. Adams*, 29 So. 996, wherein it was held that the provisions of a section of the Mississippi code then in effect, declaring a tax to be a debt, did not authorize the collection of interest on delinquent taxes under Section 2348 of that Code, authorizing interest on contractual obligations, since it is a debt arising as a matter of law, and not from contract.

In the case of *Stovall v. City of Jasper*, supra, Mr. Justice Thomas for the Supreme Court gives an excellent collation of the authorities on the general subject of assessments for public improvements bearing interest in the absence of an applicable statute or charter so providing. At the risk of tedium, we here quote at length from that opinion:

"According to the weight of authority an assessment does not bear interest in the absence of an applicable statute or charter so providing." 44 C. J. 795, Sec. 3391."

"We have indicated that the weight of authority is that a 'special tax bill' or a municipal assessment will not bear interest in the absence of an applicable statute so providing. Such is the declared rule in California, *Himmelman v. Oliver*, 34 Cal. 246; *Haskell v. Bartlett*, 34 Cal. 281. Connecticut, *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185; *Sargent & Co. v. Tuttle*, 67 Conn. 162, 34 A. 1028, 32 L. R. A. 822; *Walsh v. Barthel*, 85 Conn. 552, 556, 84 A. 91; *Hartford v. Poindexter*, 84 Conn. 121, 79 A. 79. Illinois, *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *McChesney v. Chicago*, 213 Ill. 592, 73 N. E. 368. New Jersey, *Brennert v. Farrier, Collector*, 47 N. J. Law 75, New York, *Matter of Whitlock Ave.*, 51 App. Div. 436, 64 N. Y. S. 717. Texas, *Galveston v. Heard*, 54 Tex. 20, 447. Washington, *Shmuck v. Wheeler*, 98 Wash. 535, 167 p. 1126. And in Missouri that court has gone to the extent of declaring, in *Coatsworth Lumber Co. v. Owen*, 186 Mo. App. 543, 172 S. W. 436, that, where there is statutory authority, in the absence of a provision for interest in the ordinance for the improvement, or in the 'tax bill itself,' the same does not bear interest. In *Sargent & Co. v. Tuttle*, 67 Conn. 162, 34 A. 1028, 1029, 32 L. R. A. 822, 823, it is declared of the matter by the Connecticut court, that assessments 'upon specific property specially benefited by a local public improvement, for the purpose of paying the expense (thereof) are taxes,' that—

"The second proposition, to the effect that a tax carried no interest, as such, nor by way of penalty for nonpayment, unless the law so provides, is, we also think, a correct statement of the law. Most of the cases in which interest may be recovered, under our law, in the absence of any statute regulating the matter, are enumerated in *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185; and clearly assessments of this kind do not come within any of the classes of cases there enumerated. It will, we think, also be found true that whenever taxes have carried interest, either as such, or by way of penalty it has been by virtue of some statutory provision to that effect. And it is as it should be. At best, a tax is a burden — a necessary one, it is true, but none the less a burden — imposed on the taxpayer without reference to his consent; and it seems reasonable to hold that any increase of that burden, by way of penalty or otherwise, should be expressly made by the power which imposes it, and that, until the legislative will to increase the burden by the addition of interest has been clearly expressed, interest should not be allowed. This conclusion, which on principle seems reasonable, is supported more or less strongly by the following authorities: *Camden v. Allen*, 26 N. J. Law, 398; *Belvidere v. Warren R. Co.*, 34 N. J. Law, 193; *Brennert v. Farrier*, 47 N. J. Law 75; *Danforth v. William's*, 9 Mass. 324; *Shaw v. Peckett*, 26 Vt. 482; *Perry v. Washburn*, 20 Cal. 318; *People v. Gold & Stock Teleg. Co.*, 98 N. Y. 67; *Western Teleg. Co. v. State*, 55 Tex. 314; *Cooley, Taxn*, 300 note 4.'

"In *City of Hartford v. Poindexter*, 84 Conn. 121, 135, 79 A. 79, 84, the general rule is this stated:

"'An assessment for benefits carries no interest as such or by way of penalty unless the law so provides. *Sargent & Co. v. Tuttle*, 67 Conn. 162, 167, 34 Atl. 1023, 32 L. R. A. 822; *Hartford v. Mechanics' Savings Bank*, 79 Conn. 38, 40, 63 Atl. 658."

The statute in question, as amended, makes no provision whatever for the cost of the public improvements there authorized to be made to bear interest. Nor are we able to find any other applicable statute so authorizing interest.

The premises considered, there being no statute so authorizing, it is my opinion that the municipality has no legal right to collect interest on the amount expended by it for the improvements authorized under said Section 2051, as amended, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938.

Hon. O. L. Andrews,
Clerk of the Circuit Court,
Jefferson County,
Birmingham, Alabama.

The Reconstruction Finance Corporation is a Federal Agency and, therefore, cannot be required to pay the \$3.00 trial tax which is imposed upon all cases, both law and equity, going upon the trial docket of the circuit court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 11, 1938, in which you request my opinion as follows:

"I am enclosing you correspondence with the Reconstruction Finance Corporation, in which they are holding up some bills of ours because they wish an opinion as to the payment of \$3.00 trial tax by the Reconstruction Finance Corporation."

It is my opinion your question should be answered in the negative. This office has held that National Banks are not subject to this tax in an opinion to Hon. J. H. Green, Clerk of the Circuit Court, Morgan County—Quarterly Report of Attorney General, Vol. III, p. 213. The Reconstruction Finance Corporation is a corporation organized under an Act of Congress approved January 22, 1932, and recognized as a Federal Agency, and this being true, it would not be subject to this tax any more than a National Bank.—Biennial Report of Attorney General, 1932-34, p. 460.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Schedule 146, General Revenue Act, 1935, as amended by Acts 1936-37, p. 277—Transient vendors selling bottled drinks liable both for license for selling bottled drinks and license as transient vendor.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"We have an inquiry from a party in Tallassee, Alabama, as to what licenses he will be required to have in order to sell cold drinks, ice cream and candy from an automobile. This party informs us that he will not get out of the town but will move each day from corner to corner and make sales from his automobile.

"Kindly advise us whether or not he will be required to buy transient dealer license in addition to bottle drinks or if this is not required whether or not there will be any other license besides the one for bottle drinks."

Under the facts set out in your letter, the party in question comes squarely within the definition of a transient vendor as defined in Schedule 146, Section 348, General Revenue Acts, 1935, as amended by Acts of Special Session, 1936-37, page 277, Subsection (d) of this act provides:

"Definition of transient vendor or peddler.—When used in this schedule, the words 'transient vendor or peddler' shall be held to include any person embraced in any of the following classifications: (d) All persons who do not keep a regular place of business open at all times, in regular business hours in the same place, going from person to person, house to house or place to place or from town to town and selling or offering for sale, other than a retail merchant, goods, wares and merchandise which they carry with them and who deliver the same at the time or immediately after the sale."

Your next question is whether the payment of such transient dealer license is in addition to license for selling bottled drinks. In my opinion, this license is required in addition to that required by Schedule 146, Section 348, General Revenue Act of 1935. This Schedule 146 as amended provides:

"The payment of the privilege license required by this schedule shall not authorize any transient vendor or peddler to sell any goods, wares or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied." (Emphasis ours).

It has been considered by me that the license levied by this schedule is dependent on the manner in which the business is conducted. Quarterly Report, Vol. VII, page 168, Quarterly Report, Vol. II, page 310. The above quoted section makes it clear that it was the legislative intent to impose not only the license for the sale of bottled drinks but the transient vendors license for the manner of selling as described in your letter.

In addition thereto, Section 357 of the Revenue Act of 1935 expressly provides:

"Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

It is, therefore, my opinion that the party in question is liable for both these licenses.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

July 5, 1938.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Interstate commerce—Where goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation, provided there are circumstances demonstrating with certainty the destination of the goods. Such interstate commerce sales are not subject to Sales Tax Act approved February 23, 1937, (General Acts 1936-1937, p. 125) as such are within the exemption of subsection (f) of Section 2 thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 27, 1938, which is as follows:

"In the administration of the Alabama Luxury Tax Act (House Bill 179, approved February 23, 1937) there are numerous questions which have arisen with regard to the application of the tax to certain sales involving the element of interstate commerce. The Act itself (sub-section (f), Section 2) specifically provides that: 'There shall be excepted from the gross receipts of sale so as not to be taxed so much thereof as is derived from business conducted in commerce between this State and other States of the United States, or between this State and foreign countries, which the State of Alabama is prohibited from taxing under the Constitution of the United States of America'. In view of this provision of the Act, the Commission has not contended that the tax applies to any sale which is actually a sale made in interstate commerce. The question has arisen, however, as to whether or not certain sales are made in interstate commerce to such an extent that they are not subject to the tax in question.

"We will endeavor to state the various questions which are now before the Commission, as follows:

"(1) A contractor who maintains his principal place of business within the State of Alabama, places an order with an Alabama dealer in building materials and by the terms of his order requires the dealer, who is located within the State, to make delivery of the materials at a place where they are to be used in some other State than Alabama. In this case, both the buyer and the seller are located in the State at the time the order is placed and the order is placed within the State and filled from stocks of goods located within the State and the purchase price is paid by buyer within the State. The goods, however, are shipped in interstate commerce and delivered by the seller to the purchaser or his agent at a point outside of the State of Alabama. Is the seller required to collect the 2% tax upon such transactions? In making this inquiry, we ask you to bear in mind that the Act specifically provides that all sales of building materials to contractors for use or resale as real estate are retail sales.

"(2) A seller located within this State sells tangible personal property at retail to a railroad company operating in this State. The sale is

f. o. b. the cars of the railroad company on its tracks at a point within the State of Alabama for transportation and delivery to some point designated by the purchaser in another State, all of which is part of the original contract.

"In another case, the seller, located within this State, contracts with the purchaser to sell material at retail f. o. b. railroad cars at a point in this State but, under the provisions of the contract, the purchaser pays the freight to point of destination. The seller is obligated to ship and consign the material to a destination outside of the State of Alabama.

"You will note that in one instance the purchaser is the common carrier, while in the second instance the purchaser is not a common carrier but in both cases the goods are sold f. o. b. the cars in Alabama.

"There is no contention on the part of the Commission that the shipment is not in interstate commerce but the question arises as to whether or not the sale itself is a sale in interstate commerce so as to prevent the State from requiring the seller to collect the 2% tax required by House Bill 179."

I am of the opinion that each of the three situations presented in your inquiry is an interstate commerce sale and is not subject to the Sales Tax Act approved February 23, 1937, (General Acts 1936-37, p. 125) as being within the exemption of subsection (f) of Section 2 thereof.

In dealing with the general proposition of "Purchase for Transportation out of State", 11 American Jurisprudence, 41, states as follows:

"Section 42.—Purchase for Transportation out of State.—Purchases of goods within a state may form part of transactions in interstate commerce, for if transportation is incidental to a sale, it is immaterial which comes first. Thus, where goods are purchased in one state for transportation to another, the purchase is interstate commerce quite as much as the transportation, provided, it seems, there are circumstances demonstrating with certainty the destination of the goods. Thus, the buying of grain within a state for shipment to markets in other states constitutes interstate commerce if followed by shipments into other states. * * * *

In support of the above rule the following authorities are cited: *Eastern Air Transport v. South Carolina Tax Commission*, 285 U. S. 147, 76 L. ed. 673, 52 S. Ct. 340; *Dahnke-Walker Mill Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 S. Ct. 106; *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66, 67 L. ed. 865, 43 S. Ct. 485; *Farmers' Grain Co. v. Langer*, (C. C. A. 8th) 273 F. 635, 19 A. L. R. 148, affirmed in *Lemke v. Farmers Grain Co.* 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244; *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 74 L. ed. 504, 50 S. Ct. 169; *Shafer v. Farmers Grain Co.* 268 U. S. 189, 69 L. ed. 909, 45 S. Ct. 481; *Lemke v. Homer Farmers' Elevator Co.* 258 U. S. 65, 66 L. ed. 467, 42 S. Ct. 250.

The case of *Dahnke-Walker Milling Co. v. Bondurant*, supra, involved the situation where the purchaser, a foreign corporation, took delivery of goods within the State but on board cars of a public carrier, intending to forward it to an out-of-state destination. The Supreme Court of the United States held the transaction was interstate commerce. There, the Court said:

"Such (interstate) commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. * * * **On the same principle where goods are purchased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation** (citing authorities). This has been recognized in many decisions construing the commerce clause * * * . **Buying and selling** and the transportation incident thereto constitute commerce. * * * Interstate commerce consists of intercourse between citizens or inhabitants of different states, and includes not only the transportation of persons and property, and the navigation of public waters for that purpose, but **also the purchase, sale and exchange of commodities**. In no case, has the Court made any distinction between buying and selling, or between buying for transportation to another State, and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

"Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The State Court stressing the fact that the contract was made in Kentucky, and was to be performed there, put aside the further fact that the delivery was to be on board the cars, and that the purchaser in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what had otherwise seemed an intrastate transaction, was part of interstate commerce." (Citing authorities).

In the case of **Pennsylvania R. R. Co. v. Clark Coal Co.** 238 U. S. 456, 59 L. ed. 1406, the United States Supreme Court further stated:

"In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or **the place at which title passes, is not determinative.**"

And in the case of **Western Oil Co. v. Lipscomb**, 244 U. S. 346, 61 L. Ed. 1181, the Court held a shipment to be interstate commerce and not taxable under facts there which they said was "a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effort be given to the bill of lading," and further, that "It is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. See also **B & O v. Settle**, 260 U. S. 166, 67 L. Ed. 189.

In the most recent case of **Santa Cruz Fruit Co. v. National Labor Relations Board**, 82 L. Ed. 653, the United States Supreme Court adheres to the above principles. There the Court said:

"There is no question that petitioner was directly and largely engaged in interstate and foreign commerce. We have often decided that sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f. o. b. at stated points within the State of origin for transportation. See **Savage v. Jones**, 225 U. S. 501, 520; **Texas and N. O. R. R. Co. v. Sabine Tram Co.**, 227 U. S. 111, 114, 122; **Pennsyl-**

vania R. R. Co. v. Clark Coal Mining Co., 238 U. S. 456, 465-468. A large part of the interstate commerce of the country is conducted upon that basis between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the agencies which Congress has established. Pennsylvania R. R. Co. v. Clark Coal Mining Co., supra.

" * * * It is upon this well-established principle that the constitutional validity of the National Labor Relations Act has been sustained. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 38.

" * * * And the place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce."

The case of *Superior Oil Co. v. Mississippi*, supra, which holds a certain transaction not to be interstate commerce was based on the facts of the particular case and does not affect the above principles. In that case, there was involved an attempt to evade the tax through the process of a contract of sale, which the Court said "had no other use than * * * to try to convert a domestic transaction into one of interstate commerce." Further, that "the only purpose of the vendor here was to escape taxation." In other words, there, the business was local to Mississippi, and aside from the fact that the goods were delivered to the so-called consignee within the State, and were in its hands throughout, there was no consignee at the point of destination in Louisiana, and there was no point of destination for delivery of the oil therein, merely a neighborhood in which the backers that had bought it and already held it expected to sell it again, and the Court there very properly held that it was "not within the power of the parties by the form of their contract to convert what was conclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause." The court said further "A distinction has been taken between sales made with a view to a certain result and those made simply with a different knowledge that the buyer contemplates that result."

From the foregoing, it appears that the question of whether or not a transaction is interstate commerce is now dependent on the legitimate and authentic transportation feature, the place of the consummation of the sale and the billing of the goods being immaterial. In other words, if there is a legitimate and authentic transportation of goods from one state to another, the transaction is considered interstate commerce regardless of the mode of billing or the place of the consummation of the sale.

The premises considered, it is my opinion that each of the situations presented in your inquiry constitutes interstate commerce transactions. In each case there is a legitimate and authentic transportation from the State of Alabama to another State. In my opinion, the fact that the sale was consummated in this state by residents of this state is immaterial in one situation. It is my opinion that in the other situations the fact the sale is f. o. b. cars in Alabama is of no consequence. Therefore, since the sales in question are interstate commerce transactions, such come within the exemption of subsection (f) of Section 2 of the Sales Tax Act approved February 23, 1937, (General Acts 1936-1937, p. 125), and no sales tax is collectible.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

July 5, 1938.

Hon. Henry S. Long, Chairman,
State Tax Commission,
Capitol.

Licenses—Chain Stores—

Person opening a chain of stores must secure a license for each store and where one of the stores is closed in one county, and another store opened in another county, the license of the closed store is not transferable to the new store, but an additional license must be secured.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter wherein you request my opinion as follows:

"Will you please furnish this department with your formal opinion in regard to the following questions:

"In December, 1937, a chain store operator filed application with this Commission for 1938 licenses to operate a chain of eighteen stores, which constituted the complete chain as of January 1, 1938. The licenses for these eighteen stores were duly issued. On January 20, 1938, one of these stores which was located in Jefferson County was closed. On February 28, 1938, another one of these stores which was operated in Jefferson County was closed. On March 1, 1938, a new store was opened by this operator in Jasper, Ala., and on March 7, 1938, another new store was opened by this operator in Sylacauga, Alabama.

"Under the facts stated above, it is requested that you advise whether or not this Commission would have the right to transfer to the new stores located at Jasper and Sylacauga, respectively, the licenses which were originally issued for the two stores which were closed in Jefferson County, Alabama.

"It is also requested that you advise whether or not in your opinion any license issued under the provisions of the Alabama Chain Store Tax Act may be transferred either to a new store operated by the same person for which the original license was issued or may be transferred to a new owner of the original store for which the license was issued.

"If, in your opinion, the licenses described in the first part of this inquiry may be transferred, please advise what charges should be made for such transfer.

"If it is held that the licenses originally issued for the operation of the two stores in Jefferson County cannot be transferred to the new stores operated in Jasper and Sylacauga, respectively, then will you please advise whether or not the new licenses required to be issued to the new stores located in Jasper and Sylacauga should be issued under Schedule 155.4d or under Schedule 155.4e of the 1935 Revenue Act.

"In other words, if this operator is required to obtain any licenses for the two new stores, shall these licenses be issued on the same schedule of payments as the licenses were issued for the original eighteen stores or shall they be issued as if the two new stores were in addition to the original eighteen stores, bearing in mind that between the time for an issuance of the old license and the application for the new, two stores have been closed, thus leaving the chain with the same number of stores as when the original application was filed."

In my opinion the license described in your inquiry cannot be transferred to the new stores. The licensing provisions are contained in Article 12, Revenue Act of 1935. Schedule 155.1 thereof (Simon's Code, p. 300) provides in part as follows:

"The applicant desiring to operate, maintain, **open** or establish such stores, shall make a separate application for a license to operate, maintain, open, or establish each store, but the respective stores for which the applicant desires to purchase license may all be listed on one application blank." (Italics ours).

You will note that the licensing provision applies on either one of four incidents, namely: "to operate, maintain, open or establish each store". It is my interpretation of this section that the license is due when the store is opened and the mere fact that the store subsequently closes or is closed, has no effect.

The only provision for a transfer of a license is found in Section 358 (1935 Revenue Law, Gen. Acts 1935, p. 561) but this contemplates an actual sale of the business to a new ownership. It is fundamental that unless a transfer is permitted by the licensing statute, a license cannot be assigned or transferred. 37 C. J. P. 245. There is nothing in our law which permits a transfer of this license. If, as stated by you in your inquiry, one of the stores is sold to a new owner, the license may then be transferred under the provisions of Section 358 subsection (b) supra. See also Quarterly Report of Attorney General, Vol. I, p. 358.

In reply to the second portion of your inquiry, it is my opinion that the new licenses required to be issued for the new stores located in Jasper and Sylacauga should be issued under the provisions of Schedule 155.4(d), since together with the new stores the whole chain of stores is not in excess of twenty stores.

Yours very truly,

A. A. CARMICHAEL,
Attorney, General,

July 5, 1938.

Hon. O. L. Bethune,
Tax Assessor,
DeKalb County,
Fort Payne, Alabama.

1. Motor vehicles, assessment for taxes—Assessment for ad valorem taxes on motor vehicles must be made pursuant to Schedule

158.12 of the Revenue Act of 1935 at or before the time of applying for license tag thereon.

2. Motor vehicles not subject to assessment as part of stock of goods of automobile dealer but subject to separate assessment.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of December 1, 1937, in which you request my opinion as follows:

"In reference to yours of the 24th inst., I will give you more facts as to my inquiry of the 15th.

"The Rains Chevrolet Company claims that they should not pay ad valorem tax on the motor vehicles which they had in stock on October 1st. at the time they buy tags for these motor vehicles. They claim that they carry these motor vehicles in their assessment of the corporation. These are motor vehicles that were owned and operated in this state last year.

"In volume 7 page 245 of the Attorney General's rulings where is stated the following:

'Every person, firm or corporation who desires to operate a motor vehicle on the public highways of Alabama, shall first return such motor vehicle for ad valorem taxes to the tax assessor of the county in which he resides, for the preceding year and the tax assessor of this county shall deliver to such person who makes the return as herein required a certificate of assessment on form provided by the State Tax Commission, and such certificate shall be the warrant of the tax collector to collect the tax as shown thereon.'

"I understand the above to mean that the ad valorem tax must be paid before the tag is issued to anyone whether it be a firm, corporation, or individual.

"Please give me a ruling on this at once so that I may satisfy all that are concerned."

As I understand your letter, the Rains Chevrolet Company claims that the motor vehicles which they had in stock on October 1st have been included in their assessment of ad valorem taxes. They, therefore, deny their liability for assessment and payment of such ad valorem taxes at the time of applying for a license tag thereon.

In my opinion, such company must make return and pay taxes at or before the time for applying for license tag. Such is the direct and clear language of Schedule 158.12 of the Revenue Law of 1935, which provides as follows:

"(a) To prevent motor vehicles within the meaning of this Act from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same, no license shall be issued to operate a motor vehicle on the public highways of this state nor shall any transfer be made by the probate judge as provided under this Act, until the **ad valorem tax on such vehicle shall have been paid** in the county for the preceding year, as evidenced by a receipt of the tax collector where the owner of said vehicle resides, if the vehicle is owned by an individual, and if the vehicle is owned by a firm, corporation or association, then as evidenced by the receipt of the tax collector in the county in which said motor vehicle is used or operated. Every person, firm, or corporation, who desires to operate a motor vehicle on the public highways of Alabama shall first return such motor vehicle for ad valorem taxation to the tax assessor of the county in which he resides, for the preceding tax year, and the tax assessor of such county shall deliver to such person who makes the return as herein required, a certificate of assessment on a form provided by the State Tax Commission, and such certificate shall be the warrant of the tax collector to collect the tax as shown thereon."

It seems from your letter that the company in question claims that they have included these motor vehicles in their assessment for ad valorem taxes. If such was done, in my opinion, it was erroneously done. While it is true that Section 10-D of the Revenue Law requires the payment of ad valorem tax on all stocks of goods, wares and merchandise, and Section 31 requires the tax assessor to make an assessment against each person of all property owned by them, in my opinion, this general requirement is subject to the specific provisions as to the assessment of motor vehicle taxes. As early as 1923, this direct question was decided by this office in the opinion in the Biennial Reports of the Attorney General for 1922-24, page 225. It was there stated:

"I will say that, in my opinion, the Act relating to licenses and taxes on automobiles, approved September 25, 1923, places automobiles for taxation in a class by themselves. Section 19 of this Act provides that every automobile owner shall show that he has paid the tax on his automobile for the past year when he applies for a license. To construe this law so as to make the dealer pay an ad valorem tax on automobile as a part of his stock in trade, and then make the purchaser pay a tax on the same automobile for the same year, would exceed the constitutional limit as to state and county taxes on automobiles. In other words, the present law, in my opinion, requires that the tax be paid upon each separate automobile, and, therefore, it is my opinion that automobiles should not be considered as part of merchandise of a dealer for purpose of taxation."

Section 20 (c) of this 1923 Act there referred to expressly provided that after the first day of October, 1923, motor vehicles should not be included in any assessment made by any person, firm or corporation as of the first day of October, 1923, or subsequent years. This section was followed by Section 18(c) of the Acts of 1927, page 139, which appears as subsection (c) of Schedule 13 of Section 334 of the 1929 Compilation of the Revenue Laws at page 215. In view of this subsection (c) it was held in the opinion in Biennial Reports, 1930-32, page 454, that there was no provision for the assessment of motor vehicles in the way property is ordinarily assessed and that motor vehicles are not assessable until application for tag license is made.

Schedule 158.12 above quoted follows subsection A of this same Section 18 of the Act of 1927. While it is true that subsection C, above referred to was omitted from the Revenue Law, in my opinion, this omission does not affect the conclusion hereinbefore reached, but such omission is explainable as the necessity therefor had long since ceased. Since 1923, no assessment of motor vehicles was made with the ordinary assessment for ad valorem taxes, but such assessments were made on separate blanks made and prepared by the State Tax Commission. Section 27 of the Revenue Act of 1935, requires the State Tax Commission to prepare forms for assessment for ad valorem taxes. Such forms so prepared pursuant to this section contain no blank for the assessment of motor vehicles, but to the contrary, expressly exclude motor vehicles (tax return list, question 19.) As is specifically required by Schedule 158.12, the State Tax Commission prepares a special form for the assessment of motor vehicles for ad valorem taxes. If anything were necessary to strengthen the conclusion of the opinions above cited, this long standing administrative construction clearly shows that such motor vehicles are not assessable for taxation as are other articles of personal property or stock of goods, wares, and merchandise, but are assessable in the manner and at the time required by Section 158.12.

It is, therefore, my opinion that the party inquired about must assess said motor vehicles for taxation and pay the tax thereon at or before the time of applying for license tags thereon. Any assessment of such motor vehicles for ad valorem taxes as part of the stock of goods, wares and merchandise is erroneous.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938.

Hon. A. L. Hasty,
Judge of Probate,
Marengo County,
Linden, Alabama.

Veterans—Peddler's License—

1. Exemption allowed qualified veterans from license in each county in which he does business, provided total amount of all county licenses issued do not exceed \$25.00.

2. Itinerant vendor or peddler required to pay state license in each county where he does business under Schedule 146, as amended, of the Revenue Laws of 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 4, 1938, in which you request my opinion as follows:

"Please advise me whether a War Veteran who is exempt from payment of a Peddler's license can get exemptions in more than one County; that is, this veteran has exemptions or license for Dallas County and he is doing business in Marengo County and other Counties and thinks he should be exempt in each county. This license comes under Schedule No. 230 (H. 180) Section B. Also let me know if a State license should be issued for every County in which the business is conducted under said Schedule?"

Under Section (b) of an Act approved March 2, 1937, (Gen. Acts 1936-37, p. 277) which act amends Schedule 146 of the General Revenue Laws of 1935, it is provided that:

"(b) Each itinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies, who operate on foot or use of a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, shall pay an annual license of Twenty Dollars (\$20.00) to the State and Ten Dollars (\$10.00) to the county in each county in which they do business."

You will note that this section provides that there shall be a license of \$10.00 paid by each itinerant vendor or peddler of merchandise in each county in which they do business.

By Section 3 of an Act approved September 13, 1935, (Gen. Acts 1935, p. 1057) there is granted the following exemption to disabled veterans of the wars mentioned therein who are properly qualified under the act:

"Section 3. That each such person who shall engage in, or carry on, any business or occupation as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper or apprentice, for which business or occupation a license tax is prescribed by or for any County of Alabama, shall be entitled to a license from such county to so engage in, or carry on, such business or occupation upon payment of the license tax so prescribed, less all, or such portion of, such license shall not exceed Twenty five dollars (\$25.00); provided, however, that no such person shall be entitled to the prescribed deduction or commutation in respect of more than one business or occupation for which a license tax is prescribed by law."

Section 11 of the aforementioned Veteran's Exemption Act, provides as follows:

Section 11. No license herein provided for shall be issued in any county other than the county wherein the disabled veterans is a bona fide resident, provided, however, that should a disabled veterans holding a veteran's license desire to engage in a business or occupation in a county in this State other than the county in which he has secured such veterans license, he shall produce the license issued to him in the county of his residence to the probate Judge of the county where he desires to do business and if the license in such other county together with the license

issued in the county of his residence does not exceed the Twenty Five Dollars (\$25.00) exemption herein granted he shall be exempt to such extent, and such probate judge shall countersign the license obtained in his county without charge or fee and it shall thereafter be as valid as though issued by the probate judge of the county of his residence."

Answering your first inquiry, I wish to advise that under the provisions of Section 11, above quoted, a veteran otherwise qualified is entitled to an exemption from county licenses in each county in which he does business provided the licenses issued do not in the aggregate exceed the \$25.00 exemption granted by Section 3, supra.

For example, if an applicant for exemption under Section (b) of Schedule 146, as amended, procured an exemption from the \$20.00 license due the county in Marengo County, the County of his residence he would be entitled to an exemption of \$10.00 in Dallas County should he choose to go there and if he then desired to go into Montgomery County, he would be entitled to \$5.00 exemption on the \$10.00 license in such county. If he then chose to proceed to Pike County, he would be entitled to no further exemption, the \$25.00 exemption having been consumed.

You next inquire whether a state license should be issued for every county in which the business is conducted under Schedule 146 (b) as last amended.

In my opinion the itinerant vendor or peddler dealt with under Schedule 146 (b) is required to take out a state license in each county in the state in which he engages in business.

Your attention is directed to an opinion rendered under date of June 23, 1938 to Hon. Wm. Varner, Judge of Probate, Macon County, the reasoning adopted therein being applicable to the conclusions reached in this regard. A copy of said opinion is herewith enclosed for your information.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Filing Fees: When a deed is offered for record conveying property sold under contract, which contract has been recorded by paying the deed tax on the down payment and the mortgage tax on the balance due under the contract, said deed should be recorded without the payment of a privilege tax on the same.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"Please advise us at your earliest convenience what tax to charge on the following deed:

"Mr. A. agrees to sell to Mr. B a vacant lot for the sum of \$3,300.00 payable as follows: One thousand (\$1,000.00) Dollars cash, and \$2,300.00 in balance to be paid on a certain date without interest. Parties of the first part covenant that upon the payment of the \$2,300.00 balance they will execute a deed with full covenants of warranty to the party of the second part.

"When the purchase contract was filed for record a deed tax of \$1.00 for the \$1,000.00 down payment and mortgage tax on the balance of the agreed price, \$2,300.00, was charged. Now the Deed comes to record and we wish to know if we must charge a deed tax on the full consideration since the tax was paid on the purchase contract."

In my opinion, when the contract was filed for record, you were correct in charging a deed tax on the down payment and a mortgage tax on the balance due under the contract as provided by Schedules 94 and 46 of the 1935 Revenue Act. Opinion to Judge W. M. Vaughan of Dallas County, rendered on June 29, 1934.

In the case of **Thompson v. Smith**, 174 So. 797, Justice Foster speaking for the Court, said:

"So that we think, when there is a contract of sale of real or personal property by which either the title is reserved in the vendor as security for the debt, or by which the title passes and what is known as a lien is reserved for that purpose, and such instrument is offered for record, there is due to be paid both the mortgage tax and the deed tax, as provided in Schedules 94 and 46, *supra*, respectively."

When the deed is recorded, no privilege tax should be charged on the same, as the deed tax has already been paid on the down payment and the mortgage tax on the balance due under the contract.

In *Thompson* case, *supra*, the Court said:

"A deed or conveyance is but evidence of what the parties have agreed."

Our Constitution and statutes seek to avoid double taxation.—*State v. National Cash Credit Ass'n.*, 224 Ala. 629, 141 So. 541.

I am familiar with the case of **Hawkins v. Pure Oil Co.**, 232 Ala. 660, 169 So. 307, but in that case there was no question of double taxation as the recording tax had never been paid on the deed.

Therefore, it is my opinion that you should allow the recordation of the deed without collecting any privilege tax on the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. Hunter Phillips,
Tax Assessor,
Choctaw County,
Butler, Alabama.

Taxation—Homestead Exemption—

Act 107, General Acts 1936-37, p. 113.

A building operated primarily for a hotel although occupied in part by the owner as a residence, is not entitled to a homestead exemption.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of June 4, 1938, wherein you request my opinion as follows:

"Mr. W. B. Adams operates a hotel in Butler, of about twenty rooms, and he and his family live in this hotel and make it their home. Mr. Adams entire income is made from the operation of the hotel. Please advise me if Mr. Adams will be entitled to the exemption under the Homestead Exemption Act, approved March 12, 1936."

Your question must be answered in the negative. I assume that the exemption to which you refer is that found in General Acts 1936-37, p. 113.

The Supreme Court of Alabama in discussing a question similar to the one involved herein in the case of **Garrett vs. Jones**, 95 Ala. 96, stated the general proposition as follows:

"Where the trade adaptation and use of a building is incidental or secondary only to its habitation as a dwelling — where the chief use of the structure is that of a home for the owner, and some part only not essential to this end is fitted up and used as a shop, an office or salesroom—it is a homestead; but, when this state of facts is reversed, and the residence feature is only auxiliary to the business use — where only a relatively small part of the building is devoted to the use of habitation, and the chief adaptation and use are those of business — the building is not a homestead, even though the occupant have no other home, and uses this for all the purposes of living."

The court in this opinion speaking specifically as to the situation involved in your question stated:

"The owner of a hotel erected for and adapted to the purposes of public entertainment would not have homestead therein, though he resides there with his family."

The Supreme Court has further stated in the case of **Turner vs. Turner**, 107 Ala. 465:

"A building built for, adapted to, and used as a hotel by the owner who conducts the business, cannot be claimed as a homestead even though the owner resides therein as an incident to his business."

From the facts as you state them, it will be seen that the dominant use of the building of Mr. Adams is that of a hotel and its use as a residence is merely incidental or secondary to the business. See further **Opinions of Attorney General, Quarterly Reports**, Vol. VIII, p. 80 and Vol. X, p. 9.

From the above quoted authorities, it is my conclusion that the property described by you does not come within the definition of a homestead as defined by the Constitution, Section 205, and is, therefore, not entitled to the exemption under the Homestead Exemption Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. J. Oppenheimer,
Member of the Board of Revenue,
Eufaula, Alabama.

1. Coroner, before he proceeds to hold an inquest must follow strictly Section 4557, Code of Alabama, 1928, (Michie's), and unless the provisions of this section are followed strictly, the county would be without authority to pay the cost of such inquest.

2. An inquest may be held by any Justice of the Peace when the coroner is absent from the county or is unable to act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date wherein you request my opinion as follows:

"The body of Ed Cox was found dead in Beat 16, Barbour County, near Baker Hill in December of 1937. Oscar Wilson a Notary Public

ex officio Justice of the Peace, summoned a coroner's jury and held an inquest. The jury rendered a verdict that deceased came to his death by natural cause.

"There was no inquest ordered by any Judge of a Court of Record or by any solicitor. A physician was summoned and testified. A bill was presented for \$51.00 to the Board of Revenue of Barbour County, and payment refused by reason of no orders from the authority provided by Section 3751 of the Code.

"On April 1st, 1938, the Notary — acting as coroner, although this County has an official coroner — secured an order from the Probate Judge, dated April 1st, 1938, approving the inquest of December, 1937.

"Query: Would this inquest of December 1937 holding deceased came to his death from natural causes, which inquest was held without any order of any Court or Solicitor, be proper charge against Barbour County, if an order approving the inquest was not granted until April 1st, 1938?"

It is my opinion under the facts stated by you, that the county is without authority to pay any of the expenses of this inquest. Section 4557, Code of Alabama, 1928 (Michie's) provides as follows:

"Section 4557. PROCESS OF HOLDING CORONER'S INQUEST; JURY OF INQUEST SUMMONED BY CORONER. — When a coroner has been informed that a person has been killed, or suddenly died under such circumstances as to afford a reasonable ground for belief that such death has been occasioned by the act of another by unlawful means, he must forthwith make inquiry of the facts and circumstances of such death by taking the sworn statement in writing of the witnesses having personal knowledge thereof, and submit the same to a judge of a court of record or a solicitor; and if, upon such preliminary inquiry the judge or solicitor is satisfied from the evidence that there is reasonable ground for believing that such death has been occasioned by the act of another, by unlawful means, he must direct the coroner to forthwith summon a jury of six discreet householders of the county to appear before him forthwith at a specified place and inquire into the cause of such death, but no person shall be liable to serve as a juror more than one time during any one year, and no person shall be paid compensation for services as a juror on more than one inquest during one year."

The inquest in your particular case was held by a notary public as ex officio Justice of the Peace, but there is nothing in your facts showing why the coroner did not act. Section 4570, Code of Alabama, 1923, provides as follows:

"Section 4570. WHEN INQUEST HELD BY JUSTICE OF THE PEACE; FEES.—If the coroner is absent from the county, or is unable to act, any justice of the peace may hold an inquest on the body of any deceased person, under the rules and regulations in this chapter prescribed; and is entitled to the same compensation for his services that is by law allowed to the coroner."

It will be noted, therefore, that before a justice of the peace can act in such a case the coroner must be absent from the county or unable to act.

Further, before an inquest can be held, an order must be secured from a Judge of a Court of Record or a solicitor, while in your case this was not done and the subsequent order made by the Judge of Probate on April 1, 1938, approving the inquest is without authority of law and void since the attempted inquest was held in December, 1937. See further Biennial Report of Attorney General, 1928-30, p. 906.

It is my opinion that this inquest is not a proper charge against Barbour County nor can the doctor's fee of \$5.00 be paid since Section 4569, Code of Alabama, 1923, provides that a surgeon or physician must be "duly summoned by the coroner" which was not done in your situation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. W. L. Pratt,
Judge of Probate,
Bibb County,
Centreville, Alabama.

Commissioners Court may employ a pay roll clerk for road construction and pay the salary of said clerk out of the county's share of the State Gasoline Tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date wherein you request my opinion as follows:

"Please advise if the Commissioners Court of Bibb County can employ a pay roll clerk for the road construction and pay a reasonable salary of the gasoline money."

I do not find any local act governing the power of the Commissioners Court of Bibb County with reference to the construction, maintenance and improvement of public roads. In the absence of such a local act, Bibb County is governed in this respect by general law. Section 157, General Acts, 1926-27, p. 391, provides as follows:

"The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this State have general supervision of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this article. **Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of**

unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; * * * " (Italics supplied).

You will note that the court of county commissioners therefore is a court of unlimited jurisdiction and powers with reference to roads and bridges except as limited by local act or special statutes. A pay roll clerk may be necessary in the construction, maintenance and improvement of the public roads of Bibb county, and if such is the case the commissioners court has the power to employ such a pay roll clerk. See **Biennial Report of the Attorney General, 1928-30, p. 977.**

You refer in your request to paying the salary of the pay roll clerk out of the gasoline money. I assume you refer to the county's share of the State gasoline tax.

It is my opinion, based on the reasoning in an opinion by the Attorney General, found in Quarterly Reports, Vol. X, p. 196, that the commissioners court may pay a reasonable salary for a pay roll clerk out of this fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 5, 1938

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Judge of Probate authorized, within sound discretion, to continue from term to term the hearing of petitions filed by the tax collector for the sale of land for taxes, provided cause is contested and written consent of taxpayer and tax collector filed and noted on the docket, but such continuance shall not be beyond the next succeeding term. (Revenue Laws of 1935, Section 220).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 26, 1938, in which you request my opinion as follows:

"Please give me your Opinion as to whether or not Section 220 of the Revenue Acts of 1935, G. A. 1935, page 354, contains a legal prohibition

against a judge of probate or the Probate Court in the matter of continuances from term to term of the day set for hearing petitions of the Tax Collector for sale of land for taxes, whether the petition of the Tax Collector is, or is not, contested and whether the tax-payer has, or has not, entered into the agreement mentioned in said Section."

Answering your inquiry, I wish to advise that Section 220 of the Revenue Acts of 1935, (Simon's Revenue Laws, page 109), authorizes a continuance of a hearing of petitions filed with the tax collector for sale of land for taxes under certain specific conditions.

Section 220 provides as follows:

"Such cause shall be triable at the term named in said notice, and unless the cause is contested at the trial term of the Judge of Probate shall forthwith issue his decree for the sale of lands, but if the cause is contested, the court with the written consent of the taxpayer and the Tax Collector, filed in the case and noted on the docket, may for good and sufficient reason continue any cause, but such continuance shall not be beyond the next succeeding term. The fact of such agreement shall be noted on docket, and such continuance shall not necessitate a re-publication of the notice."

You will note that the cause shall be triable at the term named in the notice, in the absence of certain stated prerequisites which are as follows and which **must** exist before the Judge of Probate may continue any cause:

1. The cause must be contested.
2. Written consent of the taxpayer and the tax collector must be filed in the case and noted on the docket.
3. There must be good and sufficient reason existing in the mind of the Judge of Probate to continue the cause.
4. The fact of such agreement shall be noted on the docket.

When the foregoing provisions have been complied with, then the Judge of Probate may continue the cause, but in no case shall such continuance be beyond the next succeeding term.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 8, 1938

Hon. C. E. McNatt,
Clerk, Circuit Court,
Franklin County,
Russellville, Alabama.

Costs—

1. Costs in misdemeanor cases not payable by the State unless county has adopted appropriate proceedings under the Act of 1927, page 51, for the delivery of county convicts to the board of Administration.

2. Where convict is sentenced to life imprisonment on a felony charge and is also sentenced to hard labor on a misdemeanor charge and county has made provisions for delivery of hard labor convicts to the State Board of Administration, convict department is required to pay the costs in the misdemeanor case at the time of delivery of the convict to the State Board of Administration.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"One Alvie Hughes was sentenced in the Circuit Court of Franklin County on a charge of carnal knowledge of a girl under twelve years of age to life imprisonment on October 29, 1932. Said life sentence was suspended pending an appeal and the Supreme Court affirmed said sentence on March 8, 1934.

"While said Alvie Hughes was in the county jail pending appeal in said carnal knowledge case, he was tried in the Law & Equity Court of Franklin County on a charge of defacing the county jail and given a hard labor sentence on Sept. 7, 1923. Said hard labor sentence was suspended pending appeal and was affirmed on February 26, 1935, by the Court of Appeals.

"Said Alvie Hughes is now in the state penitentiary. The Board of Administration paid the cost in the felony case of carnal knowledge but has not paid the court costs in the hard labor case for defacing the county jail. The Board of Administration contends that Hughes must serve all of his life sentence before the hard labor sentence will begin. The Board of Administration contends that the state should not pay the costs in the hard labor case until the hard labor sentence begins.

"Please advise me if the Board of Administration should pay the costs in the hard labor case now, if not, when should said court costs be paid?"

You do not advise in your letter whether Franklin County has arranged for the delivery of its hard labor convicts to the State Board of Administra-

tion, pursuant to the provisions of the Act of 1927, page 51. If not, there is no authority requiring the payment of costs in the hard labor case by the Convict Department, but the cost in such hard labor case should be handled in the usual manner, that is, by issuing execution against the defendant, and if the execution is returned "No Property Found" then this would become a charge against the Fine and Forfeiture Fund of the county.

I think I may be safe in assuming from the general tone of your letter that Franklin County has such an arrangement with the State Board of Administration for the delivery of county convicts, pursuant to said Act of 1927. Section 2 of said Act provides:

"The State Board of Administration shall receive said county convicts in the same manner as they now receive state convicts, and shall pay to the proper county authorities the items of costs provided in Section 3667 of the Code of Alabama as now provided by law."

There is no provision in said Act as to the time for the payment of said costs by the State to the proper county authorities. Code Section 3667 provides for the payment of certain items of cost by the State in felony cases. This section appears in Article 3, Chapter 106 of the Code of 1923, "Costs and Earnings in Felony Cases." At the time of the codification of these statutes in 1923, there was, of course, no provision for the payment of cost in misdemeanor cases by the State for it was not until the Act of 1927, *supra*, that such arrangements could be made. Section 3670, appearing also in said Article 3, Chapter 106, Code of 1923, provides:

" * * * No costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall be paid when he is delivered to such officials."

This section was changed from the same section in the Code of 1907 (Section 6575, Code of 1907), which provided that where the convict was sentenced in more than one case, the costs of the succeeding cases should not be paid until the convict had served the preceding sentences. See opinions of the Attorney General, 1922-24, page 15. It is, therefore, apparent that the Legislature intended, at least in felony cases, to assure the clerk of his cost money in all cases as soon as the convict was delivered to the penitentiary officials.

In my opinion, the adoption of the Act of 1927, page 51, and the proper action of the county authorities, pursuant to such statute, make the provisions of said Article 3, Chapter 106, of the Code of Alabama of 1923, equally applicable to misdemeanor cases as to felony cases.

The further question then comes up as to when the convict was delivered to the penitentiary officials so as to make the costs payable under Section 3670 and the other statutes cited above. The facts set out in your letter show that Hughes was sentenced on the felony charge on October 29, 1923, but the sentence was suspended pending appeal. He was sentenced on the hard labor charge on September 7, 1933, but this sentence was suspended pending appeal. The felony case was affirmed on appeal on March 8, 1934, and I assume that Hughes was immediately delivered to the penitentiary officials. It was not until some time later and on, to wit, February 26, 1935, that the

hard labor sentence was affirmed by the Court of Appeals. At the time, therefore, of the delivery of the convict to the penitentiary officials, the hard labor sentence was suspended and Hughes was not delivered to the penitentiary authorities on both charges at that time. However, he was delivered to the penitentiary officials, and upon the affirmance of the hard labor sentence, he could not again be delivered to the Convict Department for the reason that the Convict Department already had him in the penitentiary. To require the county to deliver possession of a convict to the penitentiary officials where the penitentiary officials already have the convict in charge would be to require a useless and impossible act. It is, therefore, my opinion that the proper construction of Section 3670 is that where an appeal is taken in the second conviction and the convict is delivered to the penitentiary officials on the first charge, upon the affirmance of the second conviction, there is a constructive delivery of the convict under such second conviction so as to entitle the clerk to costs immediately upon the affirmance of said second conviction. It is further my opinion that this is applicable both to convictions of two felonies, convictions of a felony and subsequent conviction of a misdemeanor, or a conviction of two misdemeanors, where the proper steps have been taken, pursuant to the Act of 1927, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1938.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation — Coal tar is not a raw material so as to be exempt from ad valorem taxation under subsection (1) of Section 2 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"The Barrett Company, of this city, purchases crude tar through a pipe line from the Tennessee Company.

"Under a ruling from the Tax Commission, we construed this to be taxable inasmuch as it was, in our opinion and that of the State Tax Commission, a finished product. The Barrett Company asked that we give them a specific ruling on this item of tar, as they construed it to be semi-manufactured or raw material.

"Inasmuch as they had purchased this material from another company who had derived the tar from coal, we construed it to be taxable."

In my opinion the coal tar purchased by the Barrett Company from the Tennessee Company is not a raw material, and is not exempt from ad valorem taxation.

Subsection (1) of Section 2 of the 1935 Revenue Act, provides as follows:

"SECTION 2. EXEMPTIONS. PERSONS AND PROPERTY.—The following property and persons shall be exempt from ad valorem taxation and none other; * * * (1) All raw materials, including coke, produced during the current calendar year, when stocked at any plant or furnace, for manufacturing purposes in Alabama."

Exemptions from taxation must be strictly construed in favor of the taxing power. *State v. Tuscaloosa Cottonseed Oil Co.*, 203 Ala. 610, 95 Sou. 52; *Hattermer v. State Tax Commission*, 177 Sou. 156; *Holt v. Long*, 234 Ala. 369, 174 Sou. 759; *Hawkins, Probate Judge v. Pure Oil Company*, 232 Ala. 660, 169 Sou. 307.

My information is that the Tennessee Company takes the raw material, coal, and burns it, and that tar is one of the numerous by-products produced by the distillation of the coal.

In my opinion, the term "raw material" as used in the exemption, supra, means material which has not been changed by some process of treatment or fabrication, or material in its natural state. Any other construction would be placing a broader interpretation on the exemption in the statute than the statute itself.

The premises considered, it is therefore my opinion that the tar in question is not a raw material so as to be exempt from ad valorem taxation, but is a finished product made by the distillation of the raw material, coal.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1938.

Hon. Henry S. Long,
State Tax Commission,
Capitol.

Chain Store Act — Schedule 155.7, General Revenue Laws of 1935, as amended by Act of 1936-37, page 111 — Exception of place of business at which the principal business conducted is that of selling or distributing petroleum products, not invalid or unconstitutional.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 29, 1938, in which you request my opinion as follows:

"Under date of October 26, 1931, you rendered an opinion to the State Tax Commission with reference to the so-called Chain Store Act, House Bill 111, approved July 7, 1931, holding that the exception, contained in the Act, of the place of business at which the principal business conducted is that of selling or distributing petroleum products was unconstitutional and invalid.

"Subsequent to the rendering of this opinion the Legislature of 1935 enacted a General Revenue Law containing Chapter 3 with relation to chain stores. Schedule 155.7 of Chapter 3 was amended by Act No. 99, House 72, General Acts of 1936-37, approved February 18, 1937. This schedule as now amended contains the following:

"Term 'store' as used in this schedule shall not be construed to mean or include any place of business at which the principal business conducted is that of selling or distributing petroleum products. * * * "

"I will thank you to advise me whether or not the ruling of your office issued under date of October 26, 1931, as aforesaid, is in your judgment well-founded, and, second, whether said opinion is still applicable in view of the fact that the Legislature has re-enacted the Chain Store Law, as hereinbefore detailed."

In my judgment, the opinion of this office under date of October 26, 1931 (Biennial Report 1930-32, page 519) referred to in your letter must, in view of the recent decisions of the Supreme Court of the United States and of our own Supreme Court, be held to state an incorrect principle of law and the same is therefore withdrawn and this opinion substituted in its stead.

Schedule 155.7 of the so-called Chain Store Act (General Acts 1936-37, page 111) contains the following:

"Schedule 155.7. The term 'store' as used in this schedule shall be construed to mean and include any store or stores or any mercantile establishments which are owned, operated, maintained, controlled or for which the buying is done by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, either at retail or at wholesale. The term 'store' as used in this schedule shall not be construed to mean or include any place of business at which the principal business conducted is that of selling or distributing petroleum products. * * * " (Emphasis supplied).

That the Legislation possesses the power to select the privilege and occupations upon which it imposes a license or privilege tax is a principal well settled by judicial decision in this state. See the recent case of *Nachman v. State Tax Commission*, 233 Ala. 628, 173, So. 25.

Conceding that the power to classify exists, the question next arises as to what classifications are proper. In *1 Cooley on Taxation*, Section 334, we find the following rule stated with reference to the propriety of classifications, which rule is adopted by our Supreme Court in *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527, 530, as follows:

"A particular classification is proper where based on a reason and not purely arbitrary. There must be a reason for the classification as

distinguished from mere accident, whim, caprice, or vindictiveness. 'Clear and hostile discrimination' cannot be made under the guise of classification. A discrimination is not arbitrary, of course, where based on sound reason of public policy. On the other hand, **while there must be a reason for the classification, the reason need not be a good one, and it is immaterial that the statute is unjust.** The test is not wisdom but good faith in the classification." (Emphasis supplied).

This brings us to the question of whether or not the exemption of places of business at which the principal business conducted is that of selling or distributing petroleum products is reasonable or whether it is arbitrary and offends the constitutional provisions as to determination of the classes which shall be exempt from taxation. It is my opinion that this question may best be determined by an examination of those cases in which the particular point was at issue. A review of the authorities reveals the following three cases in which the direct point here under discussion has been before the State and United States Supreme Courts; **Liggett Company v. Lee**, 288 U. S. 517, 53 Sup. Ct. 481, 77 Law Ed. 929, 85 A. L. R. 699; **C. F. Smith Company v. Fitzgerald**, 259 N. W. 352 (Mich.) appeal dismissed 56 Sup. Ct. 115, 296 U. S. 659, 80 Law Ed. 470; **Southern Grocery Stores v. South Carolina State Tax Commission**, 55 Fed. (2nd) 931.

In the Fitzgerald case, supra, the Supreme Court of Michigan quotes with approval from the Liggett Company case, the court speaking as follows:

"Gasoline filling stations are in Michigan subject to ad valorem taxes on their real estate. The owners or operators thereof pay a gasoline tax to the state and another gasoline tax to the government of the United States. They are also subject to the general sales tax imposed by the state. We need add nothing to the reasoning of the Supreme Court of the United States in **Liggett Co. v. Lee**, 288 U. S. 517, 53 S. Ct. 481, 486, 77 L. Ed. 929, 85 A. L. R. 699, where it is said: 'Section 8, which defines a store, contains a proviso to the effect that the term shall not include "filling stations engaged exclusively in the sale of gasoline and other petroleum products." The appellants assert the exemption deprives them of equal protection, since it is arbitrary and unreasonable. It appears, however, that all dealers in gasoline, including those conducting filling stations, are required by statute to pay a license tax of \$5.00 per annum, and in addition a tax of seven cents per gallon for every gallon of gasoline or other like products of petroleum sold (Laws of Florida, Acts of 1931 (Ex. Sess.), chaps. 15659 and 15788). It has long been settled that the Fourteenth Amendment does not prevent a state from imposing differing taxes upon different trades and professions or varying the rates of excise upon various products. **Bell's Gap R. Co. v. Pennsylvania**, 134, U. S. 232, 237, 10 S. Ct. 533, 33 L. Ed. 892, 895; **Southeastern Oil Co. v. Texas**, 217 U. S. 114, 121, 122, 30 S. Ct. 496, 54 L. Ed. 688, 692, 693. Clear and hostile discriminations against particular persons and classes especially such as are of an unusual character, unknown to the practice of our governments, may be obnoxious to the Constitution, but, in view of the imposition of taxes on the operation of filling stations by other acts, pursuant to the Legislature's power of classification, we cannot declare their exemption from the tax laid by the Chain Store Act offensive to the guaranties of the Fourteenth Amendment.'

"We find nothing in the exemption in question which violates either the Constitution of this state or the Constitution of the United States."

It is to be noted that Section 2 of the Michigan Chain Store Act (Public Acts 1933, No. 265) contains the following proviso which is very similar to that employed in the Alabama statute:

"Provided that 'store' as herein defined shall not be held to include any place or places of business commonly known as gasoline filling stations or gasoline bulk plants which deal primarily in the selling or distribution of petroleum products."

In the Southern Grocery Stores case, supra, we find the following statement:

"There can be no question, we think, but that the exemption of gasoline filling stations from the tax rests upon a reasonable classification. Such stations as a general rule sell only gasoline and other articles of merchandise upon which the state collects a heavy excise tax, and it was doubtless for this reason that they were exempted from the tax in question. Furthermore, such filling stations are quite distinct from ordinary stores or mercantile establishments. Of course, if the operator of a filling station should operate a store or mercantile establishment in connection therewith, such stores would unquestionably be subject to the tax prescribed by the statute."

The principles announced in the foregoing cases are equally applicable to the exemption here under discussion. Under our revenue laws gasoline filling stations bear a special tax (Revenue Laws of 1935, Schedule 67, as amended. Simon's Revenue Code, page 242). Furthermore, there is a special excise tax on gasoline itself. (Schedule 156 of the Revenue Laws of 1935, Simon's Revenue Code, page 305, et seq.).

The imposition of these special taxes furnishes, in my judgment, sufficient basis for the classification. As stated in the Alabama Educational Foundation case, supra, it is not for us to say whether the reason for the classification be a good one, "the test is not wisdom but good faith in the classification."

Premises considered, it is my opinion that the exception contained in Schedule 155.7 of the General Revenue Laws of 1935, as amended by Acts 1936-37, page 111, of the place of business at which the principal business conducted is that of selling or distributing petroleum products, is a reasonable and valid classification and does not offend either the State or Federal Constitutions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1938.

Hon. J. H. Williams,
Superintendent of Banks,
Capitol.

Banks and Banking—

Under the provisions of Section 6339, Code of Alabama, 1923, a state bank may make additional loans to same party of over twenty per cent of its capital, surplus and undivided profits (where the original loan is twenty per cent of its capital stock), if such additional loan is properly secured as provided therein. The type of security required of said additional loan applies only to the additional loan and not to both the additional loan and the original loan.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of June 29, 1938, which is as follows:

"One of the banks under our supervision having a Capital Surplus and Undivided Profit Account of \$85,000 has approved a line of credit of \$17,000 to one of its advance merchant customers. The loan is secured by current bills receivable consisting of advances to its customers, most of whom are farmers. The loan appears adequately secured, as current receivables in the sum of approximately \$34,000 or two for one has been pledged. The amount of this loan is the maximum for a bank of this size with the type of security offered, being 20% of its Capital Structure.

"The same borrower has asked for a line of credit of \$21,300 to be secured by warehouse receipts for 600 bales of cotton which at the present time has a market value of approximately \$27,000. There is an impression that a State Bank can lend a sum equal to 20% of its Capital, Surplus and Undivided Profits when secured by satisfactory receivables and to make additional loans for an unlimited amount when secured by specific pledge of warehouse receipts for cotton or other commodities or type of security coming within the provisions of Section 6339 when not more than 80% of the market value of such commodity is loaned.

"As a construction of Section 6339 of the Code of Alabama, your opinion is desired as follows:

"(1) Can a State bank organized under the laws of Alabama legally lend an amount in excess of 20% of its Capital, Surplus and Undivided Profits to any person, firm (including the several members thereof) or corporation unless the entire amount of both loans are secured by warehouse receipts for cotton or other commodities or securities coming within the provisions of Section 6339; or in other words can a bank organized under the laws of the State of Alabama legally make a loan equal to 20% of its Capital, Surplus and Undivided Profits when secured by bills receivables or other satisfactory security, and make further or additional loans to such borrower, when that portion of the loan in excess of 20% of its Capital, Surplus and Undivided Profits, is secured by commodities or other type of security coming within the provisions of said Section?"

I am of the opinion that your inquiry should be answered in the affirmative.

Section 6339 of the Code of Alabama, 1923, provides as follows:

"Section 6339. LOANS NOT TO EXCEED TWENTY PER CENT OF CAPITAL, SURPLUS AND UNDIVIDED PROFITS.—No bank shall lend to any one person, firm or corporation (including loans to a firm, loans to the several members thereof) more than twenty per cent of its capital, unimpaired surplus and undivided profits; and, where any loan exceeds ten per cent of the capital, unimpaired surplus and undivided profits, such excess shall be secured by good collateral or other ample security; but a bank may buy from or discount for any person, firm or corporation, bills of exchange drawn in good faith against actually existing values, commercial or business paper actually owned by the person negotiating the same, in addition to loans directly made to the person, firm or corporation selling the same, and such excess loans and such purchase or discount if in excess of ten per cent of the capital, unimpaired surplus and undivided profits (in case of a corporation) shall be approved in writing by a majority of the board of directors or the loan committee, or authorized at a meeting of the board of directors or loan committee, evidenced by properly recorded minutes of such meeting, duly signed by the chairman and secretary, and, if not a corporation, same shall be approved in writing by all of its officers. The limit of loans herein fixed shall not apply to bona fide loans made upon the security of agricultural, manufactured, industrial products, live stock or other liquid securities having a market value and for which there is a ready sale in the open market, title to which, by appropriate transfer shall be taken in the name of the bank, where no more than eighty per cent of the market value of such products shall be loaned or advanced thereon. In all such cases a margin of twenty per cent between the amount of the loan and the market value of the products shall at all times be maintained (except where products are intended for immediate shipment); and the limit herein fixed shall not apply to loans fully secured by bonds or certificates of indebtedness of the United States or of this state, or of the several counties, districts or municipalities thereof, which have been duly and regularly validated as provided by law. Liabilities arising to the makers and indorsers of checks, drafts, bills of exchange, received by the bank on deposit, cashed or purchased by it, shall not in any way be considered as borrowed money or loans. It shall be the duty of the superintendent of banks to order any loan in excess of the amount herein fixed reduced to the legal limit, or the excess charged to profit and loss, provided in his opinion such excess is not well secured, and if such reduction shall not be made within thirty days after such notification, to proceed as in other cases provided for violation of the orders of the superintendent." (Emphasis supplied).

The first part of said section has application to loans to the same party not to exceed twenty per cent of the capital, surplus and undivided profits of the bank. Such loan is made in accordance with the mandates of the first part of Section 6339, supra. The emphasized portion of the above quoted section provides for additional loans of over twenty per cent of the capital, surplus and undivided profits to the same party, which are to be secured in the manner therein provided. The type of security required for the additional loan, over and above the original loan of twenty per cent of the bank's capital, unimpaired surplus and undivided profits, in my opinion, applies only to said additional loan and not to both the additional and the original loan.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1938.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

Municipal Corporations — The word "cities" as used in Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, includes all incorporated municipalities.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of September 24, 1937, which is as follows:

"Schedule 158.12 of the Revenue Code of 1935, among other things, provides that: 'The Tax Assessors and Tax Collectors of the several Counties of this State, in addition to assessing and collecting ad valorem taxes due the State and Counties on motor vehicles, shall collect the ad valorem taxes on motor vehicles due all cities in this State.'

"Section 1743 of the Code of 1923 says among other things that: 'Municipal corporations now existing, or hereafter organized under this chapter, containing two thousand or more inhabitants, shall be called cities.'

"You also referred to Attorney General's opinion on page 308 Biennial Reports 1926-1928. The conclusion in this opinion is directly opposite to the line of reasoning used and its meaning consequently not clear.

"Shall the word 'cities' as used in Schedule 158.12 of the Revenue Code of 1935 be construed to mean municipal corporations of two thousand or more inhabitants or shall it mean all municipal corporations?"

In my opinion the word "cities" as used in Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, includes all incorporated municipalities.

Schedule 158.12 (d) of Section 348 of the Revenue Act of 1935, provides as follows:

"(d) The tax assessors and tax collectors of the several counties in this State, in addition to assessing and collecting the ad valorem taxes due the State and counties on motor vehicles, shall collect the ad valorem taxes on motor vehicles due on all cities in this State. The tax collector shall report and pay over the money collected for said cities at the same time and in the same manner as State and county taxes are reported and paid over by him. Said assessors and collectors shall each receive a commission of two and one-half per cent (2½%) of the amount of city taxes collected; and the tax collector shall deduct said commission from the amount collected before paying the City Treasurer, and at the time pay over to the tax assessor commissions due him under this Act. The judge of probate shall not issue a license to operate a motor vehicle on the high-

ways of this State until all ad valorem taxes due the said State, counties and cities are paid for the preceding year as shown by a receipt of the tax collector." (Emphasis supplied).

Section 1743 of the Code of Alabama, 1923, classifies municipal corporations as cities and towns. Cities contain 2000 or more inhabitants and towns more than 100 and less than 2000 inhabitants.

The use of the word "cities" as used in Schedule 158.12 (d) supra, imports all municipal corporations. The word is used in its broadest sense. —See *Mitchell v. Franklin County Treasurer*, 25 Ohio St. 143; *Jackson v. Kansas City, etc. R. Co.*, 157 Mo. 612. 58 S. W. 32; *Noble v. State*, 112 Tex. Cr. R. 676, 18 S. W. (2d) 619. Schedule 158.12 provides for the method of collecting ad valorem taxes on motor vehicles. The license tag cannot be issued until ad valorem taxes have been paid. In order to simplify the procedure the Legislature provided for the assessment and collection of ad valorem taxes on such motor vehicles by the tax assessors and collectors respectively. This certainly implies all ad valorem taxes due; viz., State, county and municipal. Therefore, in my opinion, the word "cities" as used in Schedule 158.12 (d), supra, includes all incorporated municipalities; viz., both cities and towns as classified in Section 1734 of the Code of 1923, supra. To hold that such term was used in its restricted sense and applied only to cities, as therein classified, would vitiate the legislative intent to simplify the procedure for collecting ad valorem taxes on motor vehicles.

The above is in accordance with the holding of the opinion found in Biennial Report of Attorney General, 1926-28, p. 308, to which you refer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 18, 1938.

Hon. E. A. Kimbrough,
Sheriff, Russell County,
Seale, Alabama.

Costs of fee book and sale book for use of Sheriff to be paid for by the county.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of July 18, 1938, which is as follows:

"In accordance with instructions received from a member of the State Comptroller's Department, I have purchased a fee book and a sale book. I was instructed by the assistant examiner of accounts to the effect that it was compulsory for me to have these books in my office.

"I respectfully request your opinion as to whether or not the costs of these books are a legal charge against the funds of Russell County."

Section 7266, Code of Alabama 1923, requires the sheriff of each county to keep a fee book, in which he must enter, in the form of a regular account opened for that purpose, every fee charged by him for every distinct service rendered by him. Said Section 7266 is in words and figures as follows:

"7266. Clerks, registers, and sheriffs keep fee books. — The clerks of the circuit courts, registers and sheriffs, must keep a fee book, which, in the case of the clerk and register, is a book belonging to the office. Each such officer must enter therein, in the form of a regular account opened for that purpose, every fee charged by him for every distinct service rendered by him. The fee book must have an index pointing out the folio of the respective accounts."

Section 10202, Code of Alabama 1923, requires the sheriff of each county to keep a sale book, in which costs be entered on the property sold by him. Said Section 10202 in words and figures as follows:

"10202. Sale book; what to show. — He must keep a sale book, in which he must enter all the property sold by him under any process from any court, a brief description of such process, when the property was sold, the purchaser, and at what price."

I am of the opinion that the costs of these books must be borne by the county and should be paid for by the county.

I refer you to Section 10205, Code of Alabama 1923, which provides for the payment of such by the county. Said Section 10205 is in words and figures as follows:

"10205. Stationery to be paid for by county. — The court of county commissioners must furnish books and stationery to the sheriff for official use, in the same manner that books and stationery are furnished to the clerk of the circuit court."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

July 19, 1938.

County Boards of Public Welfare—

Traveling Expenses of Members—

County governing body may establish any reasonable basis for the determination of traveling and other expenses allowable to members of the County Boards of Public Welfare, while in attendance upon sessions of said board.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I notice that the Act providing for the Boards of Public Welfare (Acts of 1935, page 762) provides that 'Member of County Boards shall serve without compensation for their services as members, but shall be reimbursed out of the general funds of the County for the amount of traveling and other expenses actually paid out while in attendance at the meeting of the County Board.'

"Some of the members of the Board live on the railroad or on bus routes, and if they come to town, either on the railroad or on the bus route, their actual expenses can be readily ascertained. Other members live out in the country and do not have either a railroad or a bus route available for traveling, and there is no way of ascertaining their actual traveling expenses.

"Please advise me what ruling, if any, your Department has made on the question of determining the amount of traveling expenses the members of the Board are entitled to in the case mentioned. Also please advise if there is any other Act providing for the expenses of the members of the Board to be paid from any fund other than the general fund.

"If no opinion has been rendered on this question, please let me have an opinion at your early convenience, because I have claims pending in Commissioners' Court which should be determined and paid."

No opinion has emanated from this office directly answering your inquiry. In my opinion, any reasonable basis for determining the expenses of members of the County Board of Public Welfare may be employed by the county governing body. It may suggest itself to the Commissioners' Court that a stipulated sum per mile by the usually traveled route in going to and returning from the places where the board sessions are held, together with a fixed allowance per diem for the meals and other expenses of the attendance of said sessions, is an equitable and fair basis for determining the proper reimbursement to be made. So long as the method employed is reasonable, it is my judgment that the county governing body is acting within its express or implied authority and power.

Answering your second inquiry, you are advised that the Public Welfare Act of 1935, cited in your request, is the only authority for the payment of expenses of members of County Boards of Public Welfare. Cf. **Quarterly Reports of Attorney General, Vol. II, p. 240.**

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 19, 1938.

Hon. Wm. F. Maynor,
Superintendent of Education,
Blount County,
Oneonta, Alabama.

Schools — County Superintendent of Education or member of County Board of Education cannot contract with said Board of Education for the sale of materials and supplies, as such a contract would be contrary to public policy.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of June 27, 1938, in which you request my opinion as follows:

"Would a county superintendent or a member of the county board of education be allowed to sell school furnishings for buildings or equipment or to sell coal to the schools of the county for heating purposes or to sell any building material whatever including windows, doors, nails, etc. In other words, would the county superintendent or any member of the local school board be allowed to sell anything to anybody connected with the school business or otherwise through his official position for profit."

I am of the opinion that your inquiry should be answered in the negative, as such contracts would be contrary to public policy.

Section 5024, Code of Alabama 1923, as amended (General Acts 1936-1937, page 225) has no application to the instant case, as same is applicable only to contracts with the county. A county board of education is not part of the county, but is a quasi corporation and independent agency of the state. —*State v. Tuscaloosa County*, 233 Ala. 611, 172 So. 892; *Kimmons vs. Jefferson County Board of Education*, 204 Ala. 384, 85 So. 774. There is no direct prohibition in the School Code of 1927 relative to a county superintendent of education or a member of the county board of education contracting for the sale of supplies or material to said county board of education. Section 87 thereof provides that no member of the county board of education shall be an employee of said board, but makes no reference to contracts for supplies or materials.

Since there is no statutory prohibition against contracts of the nature of those set out in your inquiry, it is necessary then to determine whether such would be contrary to public policy. In my opinion this query should be answered in the affirmative.

56 C. J. 485, Section 515, in dealing with the specific matter under consideration, provides as follows:

"Section 515. Personal Interest of Officers. In some jurisdictions statutes provide that a member of a school board or a school officer cannot on behalf of the school district or other local school organization enter into a contract in which he has an individual interest, and that in

such a case the contract is void. Aside from express statutory enactment, such a contract is against public policy, and in some jurisdictions it is held that a contract so entered into is void, but in other jurisdictions such contracts are merely voidable, and are binding when properly ratified."

24 R. C. L. 579, Section 28, provides in part as follows:

"28. Contracts between Director and District. The relation of a director to the school district is of a confidential and fiduciary nature. The director represents the school district, and is its agent, and on this account, he cannot place himself in a position where his own personal interests might conflict with those of the school district which he must represent. As a general rule therefore it is unlawful for a director to enter into a contract with the school district in which he has a personal and individual interest, or to continue after election as a director in a contract relation previously assumed, and a contract so made by a director will not be enforceable. This is true even in the absence of a statute, to this effect, though in some instances statutes have been enacted either abolishing or limiting and regulating the right to contract in such cases. * * * "

46 C. J. 1037, Section 308, provides as follows:

"Section 308. Individual or Personal Interest in Transactions —a. In General. A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it. * * * "

See also *McGehee v. Lindsay*, 6 Ala. 16; *State v. Castleberry*, 23 Ala. 85; *Maddox v. Fuller*, 173 So. 12.

In view of the principles above set out, it is my opinion that a county superintendent of education or a member of a county board of education cannot contract with said board of education for the sale of supplies and materials. Such a contract would be contrary to public policy.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 20, 1938.

Hon. Whitten Wilbanks,
Tax Collector,
Lauderdale County,
Florence, Alabama.

1. Where property is acquired by the United States Government subsequent to October 1, every effort should be made to collect taxes due, from the grantor of the property.

2. Where the taxes cannot be collected from the grantor, the State has a valid lien for taxes, and may impress such lien upon the land by proper procedure.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion on the following:

"The United States of America by and through its agent, the Tennessee Valley Authority, acquired a tract of land in Lauderdale County by warranty deed on March 19, 1937. To date the 1937 taxes on this land have not been paid. The Tennessee Valley Authority is inclined to the opinion that the United States of America is not liable for the payment of 1937 taxes on the land in question.

"Inasmuch as we are now in process of selling all land on which 1937 taxes are delinquent, I would like to have an opinion from you as to whether or not the subject land should be included in the tax sale and whether or not the present owner, the United States of America, is liable for the payment of taxes."

This office in an opinion to Hon. Joseph B. Crow, under date of June 20, 1934, ruled in a situation similar to yours that the taxes can be collected from the owner of the property on October first of the tax year. The opinion holds further that the tax is a personal obligation on the part of the owner of the property on October first. I am enclosing a copy of this opinion for your information. It is my conclusion, therefore, that every effort must be made to collect this tax from the grantor of the land to the Tennessee Valley Authority.

It is settled that the state and county lien for taxes assessed against property accrues on the first day of October of each year. Section 8874, Code of Alabama, 1923, provides as follows:

"Section 8874. LIEN OF STATE AND COUNTY FOR TAXES. -- From and after the first day of October of each year, the state shall have a prior lien upon each and every piece or parcel of property, real and personal, for the payment of any and all taxes which may be assessed against the owner, or upon such property, during that year, for the use of the state; and the county shall have a like lien thereon for the payment of the taxes which may be assessed against such owner, or upon such property, during that year, for the use of the county; and these liens shall exist as to all lands bid in by the state at tax sales for the annual taxes thereafter assessed on the value of the property so purchased, in the event of the tax title failing." (Emphasis ours).

This is now settled law in this state. See *Swan & Billups v. State*, 77 Ala. 545; *Rogers v. Gaines*, 73 Ala. 218.

In case it is impossible to collect this tax from the grantor, then I suggest that the most satisfactory method of enforcing the State's right would

be by petitioning the Federal Court to impress a lien upon this property. This is apparently the method contemplated in the case of **United States v. Pierce County**, 193 Fed. 529, in a similar matter which arose in the State of Washington.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 20, 1938.

Hon. Homer F. Mitchell,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Tax Sales—Notice to non-resident delinquents.

1. The several non-resident delinquent taxpayers against whom assessments for ad valorem taxes are made may be given the notice required by Section 217 of the Revenue Acts of 1935, in one publication.
2. The several resident delinquent ad valorem taxpayers upon whom personal service is not perfected under Section 217 may be given the notice required by Acts 1936, page 216, in one publication.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Section 216 of the 1935 Revenue Act (P. 352, 1935 Acts) provides for the Tax Collector to prepare and deliver to the Probate Judge by the first of March his delinquent Tax Docket containing all real estate on which taxes have not been paid. Section 217 provides for the Probate Judge to issue a notice 'addressed to each person against whom any unpaid taxes are assessed as shown by such book,' and goes on to set out the form of the notice to be issued, and provides for said notice to be served by the Tax Collector. Sub-sections (b) and (c) of Section 217 provide for this notice to be given by publication in certain cases, i. e., to Non-residents, Guardians, Personal representatives of estates, and to others. Another Act passed April 21, 1936, (P. 216, 1936 Acts) provides for the notice to be given by publication where the Tax Collector has failed to serve the notice after two attempts.

"In cases where there are a number of persons to whom this notice is to be given by publication, including non-residents, guardians, personal representatives of estates, etc., can this notice be given to all of these parties in the same notice by listing all of the names for whom the

notice is intended and showing the amount of taxes due by each and only printing the form of the notice once or is it necessary to have a separate notice printed addressed to each person and print the form of the notice in full after each separate name?

"We are enclosing a copy of this notice filled out so as to better illustrate our question. Please advise us if the notice given in this form meets with the requirements of law so as to support a tax sale. The idea for giving one notice only is to reduce advertising cost."

In my opinion, the several persons against whom any ad valorem taxes are assessed, and who are delinquent in the payment of the same, may be notified by the same publication. The form which you have attached to your request is a substantial compliance with Section 217 of the Revenue Act of 1935.

The Act of 1936, page 216, provides, in substance, that in the event the notice required by Section 217, supra, to be given to delinquent resident taxpayers, remains unserved after two notices to the same taxpayer are returned not served, notice by publication or by posting may be given "as in the case of a non-resident."

In my opinion, publication as to the several delinquent residents upon whom service is not perfected may be made in the same publication.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 22, 1938.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

1. Officers of special election called by the Democratic Executive Committee, under the provisions of Section 51 of the 1931 Primary Act, are to be paid as provided by law for the payment of the expenses and officers of general elections held under the general election laws of this state.

2. The election officers who serve at such special elections are to be appointed in accordance with the provisions of Section 13 of the 1931 Primary Act and Section 437, et seq. of the Code of Alabama, 1923.

3. The special election is to be conducted in all manners in accordance with the rules governing the holding of any other primary election.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of June 25, 1938, in which you request my opinion as follows:

"A Democratic Primary was held in Chilton County on the first Tuesday in May, 1938, and a second Primary was held on the second Tuesday in June, 1938, to determine the nominee for tax collector, as well as the senatorial nominee, for this district. On the day of the election, the absentee ballot box was taken, by some several citizens of the County, from the polling place, and was not available for the Committee, the Canvassing Board, to canvass on the Thursday following the second Primary. J. R. Hardy, in the absence of this absentee ballot box, received thirty-two votes majority over T. L. McKee, and T. L. McKee filed a contest, and the County Executive Committee then ordered a third Primary to be held July 26, 1938, for a run-off for said office of tax collector, and the State Executive Committee ordered a new Primary, on the same date, for a run-off between the senatorial candidates. I am giving you these facts as a premises and will you please advise me as follows: First, whether or not the expenses of this Primary will be paid in the same manner as expenses of the second Primary, (See Section 7, Acts 1931, page 73). Second, also, advise me if the same election officials shall serve and conduct this third Primary, or if new election officials will have to be appointed. Third, if you know of any differences between the conduct and management of the third Primary and the second, such as preparation of ballots, conduct of absentee ballots, and the general conduct of the election, please advise me."

From the facts set out in your letter, it seems that the special primary election referred to was called pursuant to the provisions of Section 51 of the Primary Election Law of 1931 (General Acts 1931, p. 73) which provides:

"Section 51. If, upon the hearing of any contest for any office, as provided for in this Act, the committee, after an investigation and hearing of the contest, shall determine that it is impossible from the evidence before it to decide who is the legally nominated candidate for the office contested, it shall have the right and authority to direct a new primary election for the nomination to any such office, but where any action is taken by any county executive committee, either person to the contest, in the same manner as herein provided for in the case of appeals from the action of any County Committee, may take an appeal to the State Executive Committee, which shall be the court of final appeal in all party contests of nominations; provided, that upon hearing of any contest or appeal, as provided for in this act, which is not referred to and decided by a sub-committee fifteen members of any such State Executive Committee shall constitute a quorum for the hearing and determining of such contest, or appeal, provided further, that the entire committee be notified of the meeting in the usual way."

Your first inquiry is as to the expenses of such election. Section 7 of this Act provides:

"Section 7. That the officers and other expenses of any and all primary elections general or special, held under the provisions of this

Act shall be paid for in the same manner and to the same extent as is or may be provided by law for the payment of the expenses and officers of general elections held under the general election laws of Alabama, and to be paid out of the county treasury in the same manner; provided, however, that the cost of such primary elections held for municipalities or for the election of municipal officers or officials shall be paid for out of the treasury of such municipality."

In my opinion, the special primary election referred to in your letter comes within the express language of Section 7 and the expenses should be paid as therein provided. **Biennial Report of the Attorney General, 1932-34, page 380.**

I am of the opinion that your second question should be answered in the negative. I do not find anywhere in the act any provision requiring the election officials who served at the regular primary elections to serve at special elections called by the Democratic Executive Committee in cases growing out of contests or in case of a vacancy. It is my judgment that this election is a separate and distinct primary election, and the officials should be appointed to serve in said election in the same manner as officers were originally appointed to serve in the first primary. There is no more reason for having the officers who served in the regular primaries serve in a special election growing out of a contest than it would be to have them serve in case of a vacancy subsequently occurring. It is my judgment that the election officers should be appointed under the provisions of Section 13 of the 1931 Primary Act (General Acts 1931, page 77) and the provisions of Section 437, et seq., Code of Alabama 1923.

Of course, the officers handling the absentee ballots are appointed under the provisions of an act passed by the 1933 Legislature (General Acts 1933, page 193).

In answer to your third inquiry, I wish to advise that it is my judgment that the special election called by the Democratic Executive Committee should be conducted in all respects as a separate and distinct election and in accordance with all rules and regulations governing the holding of a regular primary election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

July 26, 1938

Filing Tax —

The recording of assignment of a mortgage, upon which mortgage a tax has not been paid, is subject to deed tax. Schedule 46, Section 348, Revenue Act of 1935.

The fact that a mortgage has been insured by FHA does not affect the filing tax on said instrument.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of June 29, 1938, which is as follows:

"There was presented to me this morning for recordation a written assignment of a mortgage by the First National Bank of Auburn, to Prudential Insurance Company, such assignment being dated June 23, 1938, the consideration being \$3,992.66. The original mortgage dated April 4, 1938, from Zada M. Starr and husband to The First National Bank of Auburn, securing an indebtedness of \$4,000.00, recorded in this office on May 3, 1938, at which time no mortgage tax was charged since the mortgage bank was exempt from the tax, being an instrumentality of the federal government.

"I will appreciate your opinion on the following questions:

"1. Is the assignment above referred to subject to tax (a) if filed for record by the First National Bank of Auburn; (b) if filed for record by the Prudential Insurance Company?

"2. If the assignment is subject to tax; (a) is it taxable as a deed under Schedule 46 of the 1935 Revenue Laws, or (b) is it taxable as a mortgage under Schedule 94 of the 1935 Revenue Laws?

"3. Does the fact that the mortgage has been insured by the Federal Housing Administration affect the taxability and, if so, how?

"I understand that the above is the first of a series of like assignments and I will, therefore, appreciate your letting me have your opinion on these questions at your earliest convenience."

In answer to your first inquiry, I am of the opinion that the assignment referred to is subject to the filing tax regardless of whether the Insurance Company or the bank files it for record. The assignment enures to the benefit of the Prudential Insurance Company which company is not exempt; therefore, regardless of who actually files the assignment, the tax is due.

In answer to your second inquiry, I am of the opinion that the assignment is not taxable under Schedule 94 of Section 348, Revenue Act of 1935, but is taxable under Schedule 46 of the same section, which provides in pertinent part as follows:

"No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in such property, **except the transfer of mortgages on real or personal property within this State, upon which the Mortgage tax has been paid,** deeds or instruments executed for a nominal

consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record. " (Emphasis supplied).

By the words "except the transfer of mortgages on real property within this State upon which the mortgage tax has been paid" the legislature specifically exempted such mortgages from the payment of the tax. Therefore, it was the intention of the legislature to tax all other transfers or assignments of mortgages. "The exception of a particular thing from the operation of the general words of a statute shows that, in the opinion of the lawmakers, the thing excepted would be within the general words had not the exemption been made." Lewis' Sutherland Statutory Construction, (2d) Vol. II, page 672, Section 351.

I am aware of the decision in the case of **Garrison, Judge of Probate v. Hamlin**, 215 Ala. 39, 109 So. 106, wherein the deed tax statute of 1923 was held not applicable to the transfer of a mortgage. The statute of 1923 however, differs from the statute of 1927 in that it does not contain the exemption. Necessary implication made the 1927 statute applicable to the transfer of all mortgages upon which the mortgage tax had not been paid. Biennial Report of Attorney General, 1930-32, p. 803.

Schedule 94 of Section 348 of the Revenue Act of 1935, sets out the deed tax applicable at the present time, and is identical with the 1927 statute in all provisions pertinent to your inquiry. The exemption is not, in my opinion, tantamount to payment. Therefore, I am of the opinion that the deed tax is applicable in the present instant. **Biennial Report of Attorney General, 1926-1928**, page 410; **Biennial Report of Attorney General, 1928-1930**, pages 168 and 811; **Biennial Report of Attorney General, 1930-32**, page 803.

The case of **Thompson, Judge of Probate v. Smith**, 27 Ala. App. 460, 174 So. 796; 234 Ala. 409, 174 So. 797, does not involve the transfer of a mortgage where the mortgage tax had not been paid.

In answer to your third inquiry, I refer you to an opinion of this office to Hon. John S. Golson, Judge of Probate, Butler County, under date of June 25, 1938, found in **Quarterly Report of Attorney General**, Vol. XI. This opinion holds that the fact that a mortgage is insured by the FHA does not exempt it from the mortgage filing tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

July 28, 1938.

Court of Appeals — Employment and compensation of additional clerical assistance — 1. Compensation of Stenographer employed

under Section 765 of the Code may be paid from the general funds of the State.

Statutes — General Appropriations Act — Section 25 of Acts 1927, page 681 was not validly enacted in view of Section 71 of the Constitution.

Statutes — Appropriations — Appropriation for payment of the compensation of additional clerical assistance provided by Subsection 3 of Section 765 of the Code of 1923 is a continuing one and was not repealed nor affected by the enactment of the Budget and Financial Control Act (Acts 1932, page 35) nor by subsequent appropriation acts.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Under Section 25 of Acts 1927, page 681, which is amendatory of Section 765 of the Code of 1923, the Court of Appeals is provided with one stenographer, whose employment has been determined to be necessary as is provided by law.

"Query: Is the compensation for this service to be paid out of the General Fund as provided in Section 765 of the Code of 1923, Subdivision 3?"

In my opinion, the additional stenographer provided for the Court under the provisions of Section 765 of the Code of 1923 may be paid out of any funds in the Treasury, including, of course, the general fund.

The General Appropriations Act, (Acts 1935, pages 792, 794) insofar as the same is applicable to the Court of Appeals, provides:

"For compensation of presiding judge, \$4500. for compensation of two associate judges at \$4500 — \$9000; (we interpolate that these provisions have been amended in a manner not here pertinent by Acts 1936-37, page 167) other salaries, \$5400; supplies and materials, \$190; postage, telephone and telegraph \$162.50; printing and binding, \$1735; insurance and bonding, \$12.50 — \$21,000."

I understand from your request that the Court of Appeals has requisitioned the services of a stenographer in addition to the Clerk's clerical assistants whose compensation is paid from the above-quoted appropriation.

In the 1931 and the 1935 General Appropriations Acts the provision contained in Section 25 of the 1927 Act, quoted *infra*, was omitted, so that there is now, in no event, authority for the employment of clerical assistance under said Section 25 of the 1927 Act.

However, Section 765 of the Code of 1923, which provision has been incorporated into five successive codifications of the statute, was not repealed, in my opinion, by Section 25 of the 1927 Act. Said Code section provides, in part:

"765. Employment of additional clerks in state departments. ---

"1. Whenever the employment of any clerical assistance, in addition to that prescribed by law, in any of the state departments, may become necessary in the transaction of the public business, the head of such department must certify to the governor an application for such additional force, setting forth the contingency and the nature and extent of the work to be done, and that the same can not be performed within the time that the public interest requires by the regular force employed in such department, and thereupon the governor, being satisfied that the public interest demands such service, must issue an order authorizing the employment of such clerical assistance for such time as he may deem necessary, and cause the application to be filed in his office; and that no such clerk or assistant shall be employed until such application is certified and such order passed. * * *

"3. The compensation of such clerks must be paid upon account stated, certified by the head of the proper department that the same is correct, and for services performed under the provisions of this section, and approved by the governor, upon warrant of the auditor, out of any money in the treasury."

Section 25 of Acts of 1927, page 681, provided:

"Section 25. Whenever the employment of any clerical assistance in addition to that prescribed by this Act in any of the State Departments may become necessary in the transaction of the public business, the head of such department must certify to the President of the State Board of Administration, an application for such additional force, setting forth the contingency and the nature and extent of the work to be done and that the same cannot be performed within the time that the public interest requires by the regular force employed in such department and thereupon the President of the Board of Administration—being satisfied that the public interest demands such service, must certify his approval to the Governor. In the event the Governor approves such employment, he must issue an order authorizing the employment of such clerical assistance for such time as the President of the Board of Administration certified was necessary and cause the application and order to be filed with the President of the Board of Administration, who shall, upon the Governor's approval of such appointment."

This section was incorporated into the General Appropriations Bill for that quadrennial period. If it was validly enacted as a part of the General Appropriations Bill, it would evince a legislative intention to repeal Section 765 of the Code of 1923, being a substantial substitute for the cited Code section. And if Section 765 of the Code was repealed by Section 25 of the 1927 Act, *supra*, it was not revived after Section 25 of the 1927 Act ceased to be law by virtue of its subsequent omission from General Appropriations Bills.

However, in my opinion, Section 25 of the 1927 General Appropriations Act, *supra*, was not validly enacted by the Legislature for the reason that it runs afoul of Section 71 of the Constitution, which provides:

"71. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the state, for interest on the public debt, and for the public schools. The salary of no officer or employe shall be increased in such bill, nor shall any appropriation be made therein for any officer or employe unless his employment and the amount of his salary have already been provided for by law. All other appropriations shall be made by separate bills, each embracing but one subject."

Cf. **In Re Opinions of the Justices**, 229 Ala. 98. **State v. Smith**, 188 Ala. 432. **Woolf v. Taylor**, 98 Ala. 254.

Not being a valid enactment of the Legislature, by reason of the fact that its inclusion within the General Appropriations Act is inhibited by Section 71, Constitution, the said Section 25 of the 1927 General Appropriations Act, *supra*, was not effective to repeal Section 765 of the Code of 1923, and that Code section is still in full force and effect.

Subsection 3 of Section 765 of the Code is, in my opinion, a sufficient appropriation of any money in the State Treasury for the purpose of carrying out the provisions of Subsection 1 thereof. **State Ex Rel Turner v. Henderson**, 199 Ala. 244.

It is further my opinion that the appropriation contained in Subsection 3 of said Code section is a continuing one and that the same was not repealed nor affected by the provisions of the Budget and Financial Control Act (General Acts 1932, page 35), nor by subsequent appropriation acts. See **In Re Opinions of the Justices** (Ala. Sup.) 176 So. 367. **Southern Industrial Institute v. Lee** (Ala. Sup.) 175 So. 365. Cf. **Quarterly Report of the Attorney General**, Vol. XI, page 34.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1933.

Hon. Matt A. Boykin,
Judge of Probate, Mobile County,
Mobile, Alabama.

Heirs and distributees are not entitled to notice relative to hearing of account, under oath, by special administrator.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry as follows:

"I should appreciate your advice regarding the following matter:

"Does section 5751 of the Code of 1923, regarding the settlement of a special administrator *ad colligendum*, imply that notice of such settlement and of a day set for hearing the matter of the settlement, must be given to the distributees of the estate as is provided in section 5904 for the final settlement of a regularly appointed executor or administrator?"

It is my opinion that the heirs and distributees of an estate for which a special administrator was appointed pursuant to Section 5748, Code of Alabama, 1923, are not lawfully entitled to any notice of the day fixed by the court to pass upon the verified account filed by such administrator, in settlement of his administration, pursuant to Section 5751, Code of Alabama, 1923, which I quote as follows:

"When authority of administrator *ad colligendum* ceases; duties afterwards. — Upon the grant of letters testamentary or of administration, the authority of such special administrator ceases, and on demand he must deliver to the rightful executor or administrator all the assets of the deceased which may be in his hands, and render an account on oath of all his proceedings to the probate court."

The appointment of a special administrator by the Probate Court is strictly a statutory proceeding and only such rules and regulations as the legislature has seen fit to make have application thereto.

The Supreme Court of Alabama, speaking through Justice Somerville, in the case of *Arendale, et al, vs. Johnson*, 89 So. 603, expressing their views on "the contention of the appellants that the deceased having left no widow, that his next of kin are not entitled to the same mandatory preference in the appointment of a special administrator under Section 2526, as they would be in the grant of general letters of administration", held as follows:

"This contention is manifestly unsound, and was properly rejected by the probate court in the exercise of its sound discretion in the premises — a discretion which does not appear to have been abused.

"Under section 2526 there as a mere appointment by the probate judge, and not a grant of letters by the probate court as under section 2519. A temporary administrator, or an administrator *ad colligendum*, as he is usually called, 'is a mere agent, or officer of the court, to collect and preserve the goods of the deceased, until some one is clothed with authority to administer them.' *Flora v. Mennico*, 12 Ala. 836. In that case it was expressly held that he could be removed at any time. Other than this preliminary duty of collection and preservation, he has nothing to do with the administration of the estate, as contemplated by sections 2519 and 2520. In discussing the several statutory provisions which regulate and control the grant of general letters of administration, including section 2520 (then section 1668 of the Code of 1852), this court said, more than 60 years ago, that —

" 'It is hardly necessary to observe that the rules here stated do not apply to the special administrations provided for by section 1676 of the Code.' (Now section 2526 of the Code of 1907).

"That statement was but a dictum, but it reflected the opinion of a very able bench, and has never been challenged so far as we are advised. In 18 Cyc. 112, the rule is stated that —

" 'In the selection of a temporary or special administrator the surviving spouse, next of kin, legatees, and beneficiaries have as a rule no such absolute right to preference as in case of a general grant of letters; but the selection is rather controlled by the sound discretion of the court in view of the situation.'

"This text is supported by the cases cited.

"We can discover nothing in the language of section 2526, or in the nature of the limited duties to be performed thereunder, which suggests that the temporary appointment therein provided for was intended to be subjected to the antecedent restrictions which in terms and in policy are applicable only to grants of general letters of administration."

By analogy, the statutory mandate that the probate court shall give notice to the heirs or distributees of an estate of the date fixed to hear the petition of a general administrator for final settlement of his acts and doings in the premises has no application to the hearing of an account filed by a special administrator pursuant to Section 5751, Code of Alabama, 1923, nor is there any logical implication to be derived therefrom that notice shall be given such heirs and distributees. The very fact that such special administrator is an officer of the court refutes such implication, as the court is merely requiring an accounting from its agent in the performance of a duty imposed by law. It is, therefore, my view that none of the statutes governing the settlement of a general administrator have any application to an account filed by a special administrator.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Witnesses — Grand Jury Certificate —

A Grand Jury Certificate signed by the foreman is prima facie evidence of an existing claim against the county issuing the same, but cannot be paid by the treasurer or county depository until it is endorsed, certified to or registered by the Clerk of the Circuit Court.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"We have on file in this office a witness certificate issued to an Examiner of Accounts for attendance before the Grand Jury of Russell County, in March, 1932.

"The County Depository of Russell County has requested that we ask for an opinion as to the legality of this certificate, particularly in view of the fact that there are no records in Russell County indicating that this certificate was ever issued.

"We will ask therefore, if a witness certificate is prima facie evidence of an existing claim against the County by whom same is issued?"

A grand Jury Certificate signed by the foreman of the Grand Jury as described by you is prima facie evidence of an existing claim against the county by which it is issued. *Carville vs. Reynolds*, 9 Ala. 969; *Scruggs vs. State*, 111 Ala. 60.

The certificate described by you is issued pursuant to Section 8678, Code of Alabama, 1923, and although the certificate is prima facie evidence of an existing claim, the treasurer, or in the case of Russell County, the county depository, has no authority to pay this certificate until the same is certified to, endorsed, or registered by the Clerk of the Circuit Court of Russell County. *Ryan vs. Collins*, 196 Ala. 478. See also Section 3769, Code of Alabama, 1923.

This office has held in an opinion dated July 17, 1935, to Hon. H. M. Hughes, Clerk, Circuit Court of Madison County, that there is no time limit for the filing of the claims for witness fees payable from the fine and forfeiture fund, but allow me to call your attention Section 7245, Code of Alabama, 1923, which provides in part as follows:

"All persons entitled to such witness fees which present their claims for payment to the County Depository or custodian of the County funds within six years from the date of its collection by the clerk * * * "

"All claims for witness fees reported by the clerk paid over to the county treasurer or custodian of county funds shall be forever barred after six year from the time such fees are collected and subject to disbursement * * * ."

In view of the fact that you advised me that there are no records in Russell County indicating that the certificate was ever issued, I assume that this certificate has not been endorsed, certified to or registered by the Clerk of the Circuit Court. I, therefore, advise you that the same cannot be paid by the county depository until this is done. The proper procedure to secure this endorsement is to set forth in the case of *Scruggs vs. State*, supra, at p. 65.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. E. C. Whelan,
License Inspector,
Jefferson County,
Birmingham, Alabama.

(1) Licensed plumber under Schedule 110 of Sec. 348 of the Revenue Act of 1935, who subcontracts plumbing work is subject to additional license imposed on contractors by Schedule 42 of Sec. 348 of the Revenue Act of 1935.

(2) Licensed plumber under Schedule 110 of Section 348 of the Revenue Act of 1935, who sells gas water heaters in connection with plumbing supplies, is subject to license imposed by Schedule 56 of Section 348 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your request for an opinion as follows:

"Please give me your opinion on the following question. The Pate Company of Birmingham, Alabama, a partnership doing a plumbing business, paid a license under Schedule 110 on October 30, 1937. Algernon Blair Construction Company of Montgomery, Alabama accepted a contract from the U. S. Government and paid a license under Schedule 42 for accepting contracts exceeding \$200,000.00. Algernon Blair Company subcontracted to the Pate Company of Birmingham all of the plumbing work, which contract exceeded \$5,000.00. Would the Pate Company be due a contractor's license under Schedule 42 after having paid plumber's license under Schedule 110?

"The Pate Company also sells gas water heaters in connection with their plumbing business along with other plumbing supplies. Would they be due a license for selling gas water heaters under Schedule 56?"

It is my opinion that the plumbing contractor to whom you have referred is subject to payment of a license imposed on contractors by Schedule 42 of Section 348 of the Revenue Act of 1935, as follows:

"Schedule 42. CONSTRUCTION COMPANIES OR CONTRACTORS. — Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood cement, structural iron or steel, sheet iron, galvanized iron metallic piping, tin, lead, electric wiring, or other steel, or any other building material, or shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, or who shall accept an order for or contract to excavate earth, rock or other material for foundations or any other purpose or who shall accept an order for or contract to excavate earth, rock or other material for foundation or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick terra cotta, or

other material, or shall accept a contract to construct highways, bridges, dams, or railroads, shall be deemed a contractor. Every contractor shall procure from the probate judge of the county in which he has his principal office a license to carry on the business of a contractor, provided that if such contractor has no office in this state, then he shall procure such license from the probate judge of the county where the contract is to be performed. Every such contractor shall pay a license to be ascertained in the following manner: * * *

This office in an opinion to Hon. William W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, dated August 17, 1937, reported in Vol. 8, Quarterly Reports of the Attorney General, page 136, held that a "tin shop and roofing shop operator also accepting orders or contracts for work on or in building requiring use of paint, tin, lead, etc. required to secure both tin shop license, under Schedule 110, and contractor's license, under Schedule 42 of Section 348 of Revenue Act of 1935." We observed in that opinion that "The Legislature of Alabama has seen fit to specifically disclose its intention by express words to impose both the contractor's license and the tin shop license on a party operating as is the party operating as detailed in your letter by the provision found in Section 357 of the 1935 Revenue Laws found on page 447 of Simon's Code, which reads as follows:

"Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

Therefore, following the reasoning set forth in the foregoing opinion to Judge Hill, I conclude that it was the intention of the Legislature for the plumber mentioned in your letter to pay a contractor's license pursuant to Schedule 42, supra, in addition to the license imposed by Schedule 110, supra.

With reference to your second question, my answer is in the affirmative. The payment of a license to carry on a plumbing business, and the procurement of a license to make contracts for plumbing work, would not, in my judgment, authorize such licensee to sell gas water heaters without the payment of license for such sale as is imposed by Schedule 56 of Section 348 of the Revenue Act of 1935. The license for selling gas water heaters is separate and distinct from the license for doing a plumbing business, and they are in no way related. Not all plumbers sell gas water heaters nor do all persons selling gas water heaters do a plumbing business.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. L. W. Price,
Judge of Probate,
Evergreen, Alabama.

World War Veteran eligible to exemption from the payment of an occupational license tax, pursuant to the terms of Act No. 494, General Acts of 1935, p. 1057, (exempting veterans), is entitled to additional exemption on the business of selling gasoline to which he adds additional pumps at the same place of business.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"A World War Veteran here, who has the exemption, on account of disability, for a privilege license, applied last fall and was granted a license to operate a gasoline service station for one pump. This man now wishes to install two more pumps at the same location, all under the same roof and operate the three instead of one.

"May I legally change the War Veteran's license granted him and note thereon that the Licensee may operate three pumps instead of one without additional cost to him?

"I am familiar with your opinion rendered some time ago that no War Veteran's license may be issued to a veteran for more than one business but I am not sure whether he could be granted permission to operate three pumps instead of one at the same time under the original license."

This office has already held in an opinion to you, Quarterly Report of the Attorney General, Vol. 3, p. 154, answering your inquiry if a person who has already purchased a license for one pump and wishes to install and operate additional pumps, that he may do so upon payment of the difference between the tax on one pump (which he has already paid) and that imposed for the number of pumps in additional operation. The answer of this office held that this applicant was entitled to procure such license at a reduced price provided the new pumps were a part of the same filling station equipment.

It is further my opinion that the operation of additional pumps at the same place as the first pump, for which license tax was paid, being merely an addition to the equipment, is nothing more than an enlargement and extension of the same business. The graduated tax is imposed by the revenue laws of Alabama for the privilege of selling gasoline at retail, is based upon the size of the business, and is determined by the number of pumps in operation.

The act granting exemption to a veteran limits such exemption to one business or occupation for which a license tax is required.

It is my conclusion that the veteran mentioned in your letter, assuming that the new pumps are merely an addition to existing equipment for which an exemption has been granted, is entitled to an additional exemption, the amount of which, together with the exemption already granted on the same business, may not exceed the limit of exemption prescribed for one business.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Mr. Fred Grantham,
Clerk of Circuit Court,
Geneva County, Alabama.

Election Contest — Circuit Clerk's costs and authority — Act No. 56, General Acts of 1931, page 75.

1. Costs of forms used by Circuit Clerk in summoning witnesses and in the issuance of other legal process in a primary election contest may not be paid by the county in which the parties to the contest reside, but must be borne by the respective parties to the contest at whose instance the expense was incurred.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which is as follows:

"In a Primary Election Contest, to be tried by the State Democratic Executive Committee, are subpoenas for the summoning of witnesses and other forms needed by the Circuit Clerk for the issuance of proper and legal processes requested by the parties to the contest under the 1931 Primary Act, Acts of the Legislature of Alabama, 1931, page 92, Section 48, properly paid for or furnished by the County, or are such forms paid for or furnished by the parties to the contest?

"What sum or sums, if any, should the Circuit Clerk require to be deposited by the parties to such contest for the payment of witness fees or other fees or costs?"

Your authority in a primary election contest is set forth and defined in Section 48, Act No. 56, General Acts of 1931, page 73, which is as follows:

"Upon the filing of any contest of nomination the chairman of the committee with which the contest is filed shall file a statement in the office of the Clerk of the Circuit Court of the county where the contestant resides on the fact that such a contest has been filed, giving the names of the parties thereto, the nomination contested and the day set for the hearing, and after such statement is filed the Clerk of the Circuit Court shall issue such subpoenas for witnesses and orders for production of documents and shall issue commissions for the taking of testimony by deposition as requested by either party, under the same rules and regulations as witnesses are summoned and depositions taken in Chancery Cases, each party to the contest being responsible for costs incurred by him for the summoning and attendance of witnesses on his behalf, and the clerk may issue execution for such costs the same as in civil cases. It shall be the duty of the sheriff to serve all process issued by the Circuit Clerk and execute all orders and processes of the committee, or sub-committee, trying the contest. Such committee, or sub-committee, shall have the same power and authority as the Circuit Judges of this State to enforce obedience to its orders and process; and to punish disobedience to its orders by fine or imprisonment, as for con-

tempt, and such committee shall, of its own motion, or at the request of either party, have power to require any person to produce before it, papers or documents pertinent to any inquiry before such committee or sub-committee. The chairman of the committee, or sub-committee trying the contest may issue directly to the sheriff process for the attendance of witnesses or the production of documents or commissions for taking depositions, without the intervention of the Circuit Clerk, as herein in this Act provided." (Emphasis ours).

An examination of the entire act reveals no provision therein which authorizes the county to pay the expense of procuring forms which you use in summoning witnesses and in the issuance of other legal process as stated in your letter. Without specific authority, the county has no legal right to pay this expense. **Quarterly Reports of the Attorney General, Vol. 3, page 44.**

It is my opinion that the aforementioned section requires each party to the contest to pay the expense incurred by him for the summoning or attendance of witnesses on his behalf. Therefore, if either of the parties incurred any expense for the summoning of witnesses in the contest, he would be responsible therefor.

With reference to your second inquiry, the question presented is now moot in view of the fact the contest in question has been disposed of by the State Democratic Executive Committee.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

The Probate Judge is entitled to fifty cents for making certificate of admission of patient to insane hospital.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 22, 1938, in which you request my opinion as follows:

"Please refer to Chapter 31, page 784 Code of 1923, Chapter 34, page 894 Code of 1923 and Section 7285 Code of 1923 and the fact that the Probate Judge in charging the County fifty cents each time he makes out papers for admission of patient to the insane asylum as of Section 1444 Code of 1923 and advise me as follows:

"Is a Judge of Probate entitled to a fee of fifty cents for making certificate for admission of patient to insane hospital, as prescribed by Section 1444, under Section 7285 'Each certificate given under the Chapter in relation to hospitals, diseases, infection and quarantine?'"

My answer to your request is in the affirmative. I call your attention to Section 7285, Code of Alabama, 1928, (Michie's), which section sets out the allowance and fees of the judge of probate, and specifically to the paragraph of said section found on page 1230, which is as follows:

"Each certificate given under the chapter in relation to hospitals, diseases, infection and quarantine 53"

Hospitals, as therein used, in my opinion, include insane hospitals as well as other types of hospitals.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Counties — Legitimate express charges incurred in connection with the official duties of a register are payable by the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of July 20, 1938, which is as follows:

"I am in receipt today of a letter as follows:

"Hon. Chas. Lee,
State Comptroller,
Montgomery, Alabama.

"Dear Sir:

"In many instances I am forced to prepay express charges on court files sent to Decatur, Alabama, to one of the Judges of the Circuit Court, also to pay express charges on files when they are returned by the Judge. I have been paying these charges out of my pocket from my own personal funds. In the majority of the cases I am not able to collect the money from the parties to the suit and I lose what I have paid.

"Please advise me if, in your opinion, that the County should not reimburse me out of the General Funds for these express charges. In my opinion, the County would be as much liable for the payment of these charges as it would for stamps, stationery and office equip-

ment; and in the event that I collect any of these charges, I could refund the County.

“Please let me hear from you by return mail.

Yours truly,

C. H. Keller, Register.’

“Will you please advise me if the express charges referred to in this letter would be a legal charge against the County?”

In answer to your inquiry, I am of the opinion that legitimate express charges in connection with the official business of a register are payable by the county.

Section 9604, Code of Alabama, 1923, as amended by Acts 1927, p. 693, is as follows:

“The Judge of Probate, Tax Assessor, Tax Collector, Register of the Circuit Court in Equity, Clerk of the Circuit Court, Sheriff and the County Treasurer or Custodian must be allowed reasonable expenses, for suitable books, stationery, **postage stamps**, used exclusively for official business, and telephones to be paid for by the county, on the approval of the Court of County Commissioners, Board of Revenue or other like governing body, and the Judge of Probate shall also be allowed expense for his seal of office, to be paid for by the county.” (Emphasis supplied).

This section has been given a very liberal construction. The word “stationery” as used therein, has been held to include typewriters. **Underwood Typewriter Company v. Marengo County Bank**, 203 Ala. 128, 82 So. 153. This office has also held that the word “stationery” includes rubber stamps and photostat machine. — **Opinions of Attorney General to Chairman, County Commission, Walker County, February 19, 1938; Biennial Report of Attorney General, 1928-1930, p. 67.**

In view of the liberal interpretation given this section, I am of the opinion that the words “postage stamps,” as used in said section, include express charges. The purpose of an allowance for postage stamps was to allow payment by the county to the officers therein named for legitimate expenses incurred in necessary mailing. The principle is applicable to all mailing, whether same be by the United States mail or by express. Therefore, in my opinion, such term is sufficiently broad to include express charges.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. D. E. Dunn, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Alcoholic Beverage Control Board—

1. The Alabama Beverage Control Act is not effective upon military reservations within the confines of the State of Alabama ceded to the United States.

2. The Alabama Alcoholic Beverage Control Board may promulgate rules and regulations as may be mutually satisfactory to itself and the military authorities, for importation and disposition of alcoholic beverages for consumption upon military reservations within the state, which have been ceded to the United States.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I understand that a decision has recently been rendered by the Supreme Court relative to the importation of alcoholic beverages by Army Reservations located within wet States.

"Under dates of June 15 and August 12, you rendered opinions for this Board covering this subject. I am writing you at this time to ascertain what effect, if any, this recent Supreme Court decision has on your two opinions issued to this Board."

Two former opinions of this office (Quarterly Reports of Attorney General, Vol. VII, p. 207 and Vol. VIII, p. 85) following the reasoning of the Supreme Court of the United States, as we interpreted same in the case of **State Board of Equalization v. Youngs Market Co. et al.**, 81 L. Ed. 7, held that Section 2 of the Twenty-first Amendment to the Constitution of the United States was effective to prevent the transportation or importation of alcoholic beverages into any military reservation situated within the confines of the State of Alabama, which had been ceded to the United States, in violation of the laws of the State.

In the recently decided case of **Collins et al v. Yosemite Park and Curry Co.** (MS), the Supreme Court of the United States considered directly the question of the applicability of the California alcoholic beverage control laws to transactions in alcoholic beverages by a concessionaire within the limits of a national park which had been ceded to the United States by the State of California. The State of California contended that the Twenty-first Amendment was effective to prohibit any transactions in alcoholic beverages on Federal reservations except as provided for by state law, and that such transactions were subject to the regulations of its beverage control laws. The court, in disposing of the question determined that the Twenty-first Amendment was not effective to make the beverage control laws of California applicable to transactions in alcoholic beverages upon territory within the

State ceded to the United States for constitutional purposes; and that the laws of California were operative thereon only to the extent that the same was authorized by the acts of cession enacted by the state and acceptance of the said territory on the part of the United States.

In view of this decision of the Supreme Court of the United States, the former opinions of this office are overruled and withdrawn.

In the light of said decision, it is my opinion that, inasmuch as the acts of cession by Alabama to the United States of military reservations within the State make no provision for taxing operations upon said military reservations; and inasmuch as the channelization of the sale of liquor in Alabama by and through the Alabama Alcoholic Beverage Control Board is not effective upon such military reservations; the provisions of Alabama law relative to the taxing of malt and brewed beverages, and relative to the channelization of sales of other alcoholic beverages cannot operate upon transactions in such commodities consummated upon such military reservations.

It is further my opinion that pursuant to the general powers lodged in the Board to make necessary rules and regulations to carry into effect the provisions of the act, the Alabama Alcoholic Beverage Control Board legally may proceed to promulgate such rules and regulations as may be mutually satisfactory to itself and military authorities for the importation of tax free malt or brewed and other alcoholic beverages for consumption or disposition upon such military reservations.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Dr. J. N. Baker,
Department of Public Health,
Montgomery, Alabama.

Health Department—Vital Statistics—Birth Certificates—Delayed birth certificates filed in accordance with the provisions of the General Acts, 1935, page 646, held to constitute prima facie evidence of the correctness of their contents.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter under date of July 6, 1938, in which you request my opinion as follows:

“Inasmuch as the correct date of birth plays an important part in the obtaining of pensions and benefits provided by private organizations and

the Government, I would like to know what the probative value is of a certificate of birth occurring prior to the enactment of the Vital Statistics Law, but filed subsequent thereto, in this State."

In reply, I wish to call your attention to Section 1087 of the Code of 1923, which provides in part as follows:

" * * * Any such copy of the record of a birth or death, when properly certified to the state registrar, shall be prima facie evidence in all courts and places of the facts therein stated."

I wish to further refer you to the General Acts, 1935, page 646, Act No. 247, which provides as follows:

"An Act

"To provide for the filing of delayed certificates of birth and death.

"Be it Enacted by the Legislature of Alabama.

"Section 1. THE FILING OF DELAYED CERTIFICATES OF BIRTH OR DEATH PROVIDED FOR. Birth certificates shall be accepted for filing at any time after birth, provided they be authenticated by the signature of the attending physician. If the birth was attended by a midwife, or any other person, and the certificate is tendered one year or more after birth, it must be accompanied by such sworn statements or affidavits as the State Board of Health shall prescribe. Death certificates shall be accepted for filing up to one year from the date of death, provided, that if tendered sixty days or more after death, they must be authenticated by such sworn statements or affidavits as the State Board of Health shall prescribe. Certificates of death occurring more than one year prior to tender shall not be accepted for filing. Nothing in this section shall exempt physicians, midwives, or other attendants at birth, or undertakers, or persons acting as undertakers at burials, from filing birth, stillbirth, and death certificates, as prescribed elsewhere in this article."

You will note that the General Acts, 1935, page 646, quoted supra, authorizes the acceptance for record of birth certificate at any time after birth provided they be authenticated by the signature of the attending physician or provided that such certificate is accompanied by such sworn statement or affidavits as the State Board of Health shall prescribe. You will further note that Section 1087 of the Code of 1923, provides that birth certificates of record shall constitute prima facie evidence of the truth of their statements and shall be so accepted in any courts in which they are presented as evidence.

The premises considered, it is my opinion that the probative value of a certificate of birth, which occurred prior to the enactment of the Vital Statistics Law and filed subsequently thereto, in this State, should be considered the same as those filed after the enactment of the Vital Statistics Law, provided the provisions of the 1935 Act, quoted, supra, are followed strictly. In short, any birth certificate filed in accordance with the existing laws of Alabama, above quoted, has the probative value of prima facie evidence in any court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. A. B. McDowell,
Tax Assessor,
Geneva County,
Geneva, Alabama.

Taxation—Escape Property Assessments—

1. Property sold under invalid tax sale, said tax sale having been set aside as provided for by Revenue Code of 1935, Section 232, held to be "an escape" and assessable for taxes as such.

2. Assessment for past due taxes on "escape property" held to be limited to five prior years.

Opinion by Assistant Attorney General Small.

Dear Sir:

I am in receipt of your letter of August 23, 1937, which is as follows:

"For the year 1930 W. H. Green, Bellwood, Ala., owned a house and lot in Bellwood that he did not return for taxation, the Tax Assessor assessed to him from the records this property, with a house but in 1931 the house burned and Mr. Green has never redeemed and it now develops that this property was erroneously described when sold and the State Tax Commission has declared the sale erroneous and instructed me to assess.

"Shall I assess this property for 1930 with the house and for the next seven years assess as a vacant lot? Can I go back further than five years since it was sold in error?"

In reply I wish to advise you that in my opinion the property referred to by you in your letter should be assessed as an escape, provided the assessment was set aside in the manner and form provided by law. I wish to refer you to Section 232 of the Revenue Code of 1935, which provides as follows:

"Section 232. For the real estate bid off for the State in each case the Judge of Probate shall make out a certificate of purchase to the State of like import to the one provided for in the preceding section, and deliver the same to the Tax Collector who shall, on final settlement, deliver all certificates received by him from the Judge of Probate to the State Comptroller, who shall examine carefully all certificates of purchase of real estate where the same were bid in for the State at tax sale. When the same are received by him, and if in his opinion, such sale was erroneous for want of regularity, proper or sufficient description, error in advertising or for any other cause that may appear from such certificates, he shall so declare it and return the certificate to the Judge of Probate, and charge the account of the officer making the error with all taxes, interest, fees, and costs involved in said sale. The Comptroller shall notify the Judge of Probate who issued the certificate of such cancellation and shall also notify the Tax Assessor of the County in which

the property is situated, and direct him to assess the property as an escape for the years in which it was subject under existing laws. The Comptroller when he has settled the accounts of the Tax Collector shall deliver to the State Land Commissioner all certificates of land bid in for the State which have been accepted by him, and said Land Commissioner shall cause the same to be recorded in a book kept in his office for that purpose and properly indexed for convenient reference. Lands bid in for the State shall not thereafter be assessed except as herein provided until the same have been redeemed or sold by the State."

You will observe that the above quoted provisions of law authorize the setting aside of the sale and re-assessment of the property as an escape for taxes due.

Assessment as an escape for taxes due during a period of years past is governed by the provisions of Section 45 of the Revenue Code of 1935, which provides as follows:

"Section 45. Whenever the Tax Assessor shall discover that any property has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation, and shall also endorse on such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten per cent of the taxes assessed thereon for each year. The Tax Assessor shall give notice of such escape assessment by registered mail, return receipt demanded, to the owner or to the agent or attorney of such owner, notifying such person to appear before the Assessor in person, or by agent or attorney, within twenty days after such notice is given, if there be an objection to the assessment and notifying such person that if no objection is made said assessment will be made final on the twentieth day after the mailing of such notice of escape assessment. If on the date for hearing such objection the person against whom the assessment is made fails to appear, or, if in the opinion of the Tax Assessor the assessment should not be changed and the assessment is proper, then the Tax Assessor shall make the assessment final. The property owner if he has filed objection to such assessment, may appeal from the assessment to the Circuit Court of the County in which the property is located within thirty days after such assessment becomes final, by giving notice in writing to the Tax Assessor and by filing a copy of such notice with the Clerk of the Circuit Court and giving bond to be approved by and filed with the Clerk of the Circuit Court to cover costs and thereafter such case shall be tried as other tax cases appealed to the Circuit Court from the Board of Review. The taxpayer or the State shall the right to demand a trial by jury by filing a written demand therefor, within ten days (10) after the appeal is taken. Whenever any escape assessment is made final, the taxes shall immediately become due and the Assessor or Deputy Assessor shall forthwith certify the assessment to the Collector, who shall forthwith collect same, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the Clerk of the Circuit Court in double the amount of the taxes, payable to the State of Alabama, conditioned to pay all taxes, interest and costs due the State, County or any agency or subdivision thereof."

You will observe that the provisions of this section limit the assessment of taxes on escape property to a period of five years.

You state in your letter that the house on the property in question was burned at some time during the year 1931. Since you, as tax assessor, are permitted to assess only five prior years' taxes, in my judgment, you cannot assess the house that burned in 1931, and would necessarily have to assess the property as a vacant lot, for a period of five prior years.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. W. L. Hobbs, Clerk,
Circuit Court, Russell County,
Phenix City, Alabama.

Where a judgment or decree is rendered by the Circuit Court sitting in Equity for the payment of alimony in regular monthly installments, and an execution has been issued on same within ten days as prescribed by statute, and returned by the sheriff "no property found", the clerk need not issue an alias unless the necessity arises for same or is demanded by the owner of said judgment or decree.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 22, 1938, in which you request my opinion as follows:

"A judgment awarding alimony **payable monthly** is rendered for which let execution issue.

"I have issued executions each month since date of judgment and handed same to the sheriff for collection, and the executions are returned to this office with the following sheriff's return thereon: 'No property found subject to levy'.

"Kindly furnish official opinion advising if I must continue to issue these monthly executions, even though they are returned with the sheriff's endorsement as stated above."

It is my opinion that when a register has followed the requirements of Section 7795 of the Code of Alabama, 1928, (Michie's) and issued an execution on any judgment or decree within ten days after rendition of such judgment or decree, and said execution has been returned by the sheriff, "No property found", that such clerk or register does not have to issue an alias execution unless such execution becomes necessary or is demanded by the owner of the judgment or decree.

Section 7795 is as follows:

"ISSUE OF EXECUTIONS MUST BE SIGNED AND TESTED.—The clerk or register must issue executions on all judgments in favor of the successful parties within ten days after the rendition of judgment, unless otherwise directed by the court or the judge presiding at the trial of the cause. The writ must be signed by the Clerk, and tested on the day it is issued."

Alias executions may issue under Section 7802, Code of Alabama, 1928 (Michie's) which is as follows:

"Section 7802. MORE THAN ONE WRIT MAY BE ISSUED.—More than one writ of execution may be issued at the plaintiff's cost, though the first be not returned; and when a fieri facias is returned not satisfied, or satisfied only in part, an alias fieri facias may be issued."

In holding the above, I am treating the decree as a single decree or judgment. In fact, that is what it is, even though its terms are met by payments in monthly installments.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. J. J. Sibley, Chairman,
Lawrence County Board of Education,
Mount Hope, Alabama.

Officers—Schools—

County Board of Education may execute a lease of property under its control, which it otherwise has authority to lease, for a term extending beyond the term of the present incumbent members, if said lease is made for a valid consideration and in good faith.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 26, 1938, which is as follows:

"As chairman of the Lawrence County Board of Education, I wish to ask for your official opinion on the question explained in the succeeding paragraphs. I shall be very grateful for a reply at your earliest convenience.

"The late C. C. Smith, until his death a citizen of Lawrence County, Alabama, bequeathed valuable property, including some farm land, to the State of Alabama. The income from this property, according to the terms

of the will, was to be used for the benefit of a school known as C. C. Smith School. The State Department of Education administers the property through the Lawrence County Board of Education, reserving the right of final action on any decision the latter makes.

"Heretofore the land has been rented for a period of only one year at a time. This year two men now members of the County Board but defeated for reelection to another term have moved officially to have the Board rent the land to the present tenants for a period of five years. The terms suggested are the same as those of the now existing contracts, which do not secure a return to the beneficiary. The terms of office of the two members in question expire on the last Friday in November, 1933.

"The question in point is whether the County Board of Education, with the approval of the State Board of Education, can legally execute a contract to rent the land for a period of five years, while the two defeated but still official members are in office, thus preempting the rights of the Board which is soon to have two new members."

In answer to your inquiry, I am of the opinion that a County Board of Education may execute a lease of property under its control, which it otherwise has authority to lease, for a term extending beyond the term of the present incumbent members, if said lease is made for a valid consideration and in good faith. The fact that a lease extends beyond the term of the present members of the Board of Education would not invalidate same. The contract is a contract of the board and not of the individual members thereof.

In dealing with the question of the authority of schools boards to bind their successors, 56 C. J. 485, Section 514, states as follows:

"Section 514. POWER TO BIND SUCCESSORS. Although it has been said that a public school board or officers cannot enter into a school contract so as to limit the discretion of their successors, contracts which were valid when made are binding on the successors of the board or officers making them, except where the contract is not for a necessary matter, or is for an unreasonable length of time, or where fraud attaches. Where district officers are permitted to hold office until their successors are elected and qualified, such officers may bind the district by a lease of a building for a school, even though the lease was entered into subsequent to the election of their successors but prior to qualification by such successors. **A valid lease may be made which extends beyond the term of office of the members of the board executing it,** but where the board is given discretion by statute to determine the particular classes to be taught, a contract to maintain a particular class in the building for a period beyond the term of office of the members executing it is voidable by their successors." (Emphasis ours).

In the recent case of **Corning et al vs. Patton**, (MS.) our Supreme Court held that a county governing body may lease county property for a term extending beyond the term of incumbent members of said body, if said lease is made for a valid consideration and in good faith. Such a lease is binding on the county. See also **Board of Revenue Shelby County vs. Farson, Son & Company**, 197 Ala. 375, 72 So. 613. Although these cases dealt with county property, the same principle is applicable to property under control of a County Board of Education.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1938.

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

Motor Carrier Act—Mileage Taxes—

1. State Tax Commission not authorized to credit mileage tax currently due from taxpayer with prior overpayment of mileage tax by said taxpayer.

2. Taxpayer who overpays mileage tax due by him, because of a mistake either of law or of fact, may secure refund under provisions of Act No. 432, General Acts 1931, page 527, approved July 17, 1931.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Reference is made to a letter from J. S. Freeman, Chief Clerk of the Mileage Tax Department, to Hon. Bibb Folmar, Assistant, State Tax Commission, the contents of which you present for an opinion. The letter is as follows:

"Under decree rendered by Judge Jones, Circuit Court of Montgomery County, in the case of the Alabama Public Service Commission vs. Motor Terminal & Transportation Company, where a motor carrier was operating a truck with a trailer attached, the truck and trailer was considered as one unit and the rate of mileage tax was based on that unit as operated over the highways of the State of Alabama. The Motor Terminal and Transportation Company was operating under the 1931 Common Carrier Act.

"When I took over this department I assumed that the same method of classification would apply to operators operating with the same class of equipment under the 1932 Act and would come under the same schedule for the purpose of paying mileage tax and I raised the rate for mileage tax from $\frac{1}{2}$ c to 1c per mile and collected on this basis.

"One, W. E. Jones, operating under the 1932 Motor Carrier Act, admitted that he was operating a motor tractor factor rating of $1\frac{1}{2}$ tons with an attached 6 ton trailer, protested paying on the basis of the tractor and trailer as one unit. This case was tried first before the Alabama Public Service Commission and this Commission sustained my contention. Jones appealed to the Circuit Court of Montgomery. The case was tried before Judge Carter of Montgomery County, Circuit Court. Judge Carter rendered a decision adverse to the State. The State appealed to the Supreme Court. This case has been pending since October in the Supreme Court but I noticed in the morning paper where the Supreme Court decided this case, affirming the decision of Judge Carter.

"After Judge Carter's decision, on advice from the office of the Attorney General, I accepted payments on the basis of $\frac{1}{2}$ c per mile but

wrote in the face of the audits or mileage tax reports "This payment accepted subject to correction after decision of the Supreme Court." I was of the opinion that we would win the case in the Supreme Court and in this way have claim on the operator for the balance of the taxes due.

"One operator has already refused to pay the current mileage tax claiming that he would have a credit with the State for the amount he overpaid at the rate of 1c per mile.

"I am of the opinion that this department has no authority to allow credits on that basis but that the proper proceedings for the operator will be to file a petition for refund from the State Tax Commission on regular forms and in a manner as required by law. I look for a good deal of trouble along this line and will appreciate your taking up with the Attorney General this question and get a ruling as quickly as possible as to how this overpayment as a claim should be handled."

Under the facts stated in the letter, the taxpayer has heretofore overpaid the mileage tax due by him because of a mistake of law.

There is no legislative authority for you to credit the amount of this overpayment to the mileage tax currently due by said taxpayer.

However, the taxpayer is not without recourse. He may apply for a refund of the tax so overpaid by him, in accordance with the provisions of Act No. 432, General Acts 1931, page 537, approved July 17, 1931. You will note that the procedure there outlined provides that in such a case the taxpayer shall make application for a refund of the tax so overpaid by him within twelve months from the date of such overpayment. No overpayment made by him more than twelve months from the date on which he makes application for a refund can be refunded under the provisions of said act. *Lee v. Cunningham*, 176 So. 475.

Sections 379-80 of Chapter 2 of Article 14 of the 1935 Revenue Act provide the method by which a taxpayer paying taxes under protest, other than ad valorem taxes, may recover the same. However, as I understand your inquiry, this mileage tax was not paid under protest, and these sections would not apply. Be that as it may, the taxpayer could pursue the remedy prescribed in the 1931 act, supra, regardless of whether or not he paid said tax under protest.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 19, 1938.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Exemptions—Property owned by the Presbyterian Home for Children, a charitable organization is not exempt from ad valorem tax-

ation, although the income from said property is used for charitable purposes.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 12, 1938, in which you request my opinion as follows:

"The Presbyterian Home for Children, located at Talladega, is owner of a number of pieces of property in Jefferson County on which there is an income from rentals, all of said income being devoted entirely to the Presbyterian Orphan's Home at Talladega.

"They are asking that this property be exempted from taxation but inasmuch as your opinion addressed to me on June 12, 1936, regarding the Methodist Orphanage at Selma seems to parallel this case, I have turned said down. This opinion is on page 115 of Vol. No. 3, your quarterly report. I believe the only difference is the following paragraph of their letter which reads as follows:

" 'The Presbyterian Home for Children was chartered by the General Assembly of Alabama by an act approved March 3, 1870 under the name of 'The Orphans' Home of the Synod of Alabama'.

"which reads in part:

" 'And all of the property of said organization should be exempt from taxation'.

"An early opinion would be appreciated."

In my opinion, the property concerning which you inquire is not exempt from ad valorem taxation.

Upon examination I find that the Presbyterian Home for Children was granted a charter by the General Assembly of Alabama in an Act approved December 12, 1864, (Acts of Alabama 1864, page 108) under the name of "The Orphans' Home of the Synod of Alabama".

While this act of incorporation was enacted under the authority of the Constitution of Alabama of 1819, which Constitution did not engraft on acts chartering private corporations liability to alteration and revocation by the Legislature for the public good, it contained no exemption from ad valorem taxation or any other form of tax. In an amendment approved March 3, 1870, (Acts of Alabama 1869-70, page 296) it was provided that " * * * all the property of said corporation shall be exempted from taxation." This grant of exemption from taxation was given under the Constitution of 1868.

Section 1 of Article XIII of the Constitution of 1868 engrafted on acts chartering private corporations liability to alteration and revocation by the Legislature. Section 1 provides as follows:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered, amended or repealed."

The grant of the charter to the Orphans' Home of the Synod of Alabama, which is, as stated in your letter, now the Presbyterian Home for Children, containing the exemption from taxation effected a contract between the State and the corporation which was valid and binding as it was not altered, amended or repealed. See *State of Alabama v. Alabama Bible Society*, 134 Ala. 632, 634. *Opinion of the Attorney General*, Quarterly Report, Vol. 3, page 155.

It is true that in the recent case of *Ware Lodge No. 435, etc. v. Harper*, 182 So. 59, 63, the Supreme Court stated, "The State Constitutions of 1819 and 1868 did not engraft upon acts chartering corporations the liability to any alteration or revocation", but this statement cannot be conclusive inasmuch as it is apparent that the Court must have overlooked Section 1 of Article XIII, *supra*. The Presbyterian Home for Children cannot, therefore, in my opinion, avail itself of the statement in the *Ware Lodge* case in order to secure an exemption from ad valorem taxation.

It being settled, therefore, that the Legislature may constitutionally alter the charter granted the corporation in question and deprive it of the exemption contained in the grant, your attention is directed to Act No. 194, H. B. 324, approved July 10, 1935, (General Acts, 1935, page 257) which provides as follows:

"Section 2. * * * All property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use of business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes; * * *"

Section 374 of said Act No. 194 provides:

"The exemptions from ad valorem taxation granted in this act are hereby declared to be exclusive and any laws or parts of laws, general, special or local, granting or attempting to grant any exemption from ad valorem taxation, except as in this case provided, are hereby specifically repealed."

In my opinion, the effect of the foregoing provisions of Act No. 194 is to specifically repeal the grant of exemption from ad valorem taxation contained in the amended charter of the corporation here under discussion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 20, 1938.

Hon. Daniel T. McCall, President,
Mobile County Revenue and Road Commissioners,
Mobile, Alabama.

Mobile County—Board of Revenue and Road Commissioners.

1. Failing to conform to the uniform system of accounting pursuant to laws of 1935, p. 43, does not invalidate claims against the county for purchases made, which are otherwise valid.
2. Violations of the Uniform System of Accounting and Reporting are punishable pursuant to Section 4, Gen. Acts, 1935, p. 43.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

"Local Acts of 1907, page 727, section 2; authorizes the Board of Revenue to employ a superintendent of public roads. Section 3 of said act defines his duties: 'He shall have power and authority to hire such numbers of laborers as may be provided by the board; to discharge the same: to purchase all stock, machinery, tools and supplies under bids submitted to and approved by said board;'

"On November 27, 1934, recorded in minute book twenty-nine, page 252, this board employed a superintendent of maintenance, who has been retained in this capacity up-to-date.

"Purchases for the county road department have not been made in accordance with the provisions of said act as outlined above.

"An act passed in 1935 to establish a uniform system of accounting for each county, same to become effective by October 1, 1936, as provided in section 3 of said act. A system was installed for this county as of October 1, 1936, and has been operating since. All purchases by the board have not been made strictly as set out in the uniform system, but the system has been followed in a general way, and I have signed many warrants for purchases knowing that the system was not being carried out to the letter, thinking, however, that time would correct all flaws in the manner of county purchases. Some several months ago I made an investigation relative to purchases for the road department; I was dumbfounded to learn that purchases were being suppressed; no order numbers being issued for said purchases; therefore no record was made on the books of the county acknowledging the liability of the county to these purchases. The whole procedure was to show that the road department was being operated on a cash basis, when in fact they were running far behind, to the sum of \$35,000.00 as now known. (Further investigation is now being made to ascertain the definite amount).

"I have refused to sign warrants covering these purchases as I feel that they are not legal obligations of the county and that all parties connected in any way with the act of making these purchases any suppressing the record of same from the county records are guilty of violating the uniform system of accounting as provided for in section 4, page 44, Acts of Alabama, 1935.

"It would have been impossible to get a correct financial statement from the books of the Board of Revenue and Road Commissioners of Mobile County, Alabama, with such a condition existing.

"Am I within my rights in refusing to sign warrants covering said suppressed purchases?

"What action can be taken against violators of the Uniform System of Accounting and Reporting, and by whom should action be instituted?"

In an opinion requested by you of recent date, I advised you that as President of the Board of Revenue, it was your duty to sign warrants ordered to be drawn by the Board of Revenue, but that, you could refuse to sign a warrant which was not a legal claim against the county.

By General Acts of 1935, p. 44, a uniform system of accounting was set up. The purpose of this act was to make the bookkeeping uniform in each county of the state so that an audit of these books could be made more easily by the comptroller. The fact that as regards purchases made for supplies for the road department, the uniform system was not carried out because there was no recording of these purchases as the Uniform Accounting Act requires, is not controlling as to whether or not these claims are legal claims against the county. If, as you state, these purchases have not been made in accordance with the provisions of the law governing the same, then, in that event, these claims would not be legal charges against the county and you might properly refuse to sign these warrants. However, if these purchases were made in accordance with the law governing the same, i. e., that they were authorized or ratified by the county governing body and were commodities or items which the county road department required, but no bookkeeping entries were made in accordance with the uniform system of accounting, then, it is my opinion that these claims are legal claims against the county and the warrants must be signed by you; as the failure to conform to the Uniform System of Accounting does not affect the validity of the claims.

In reply to your second inquiry, I refer you to Section 4, General Acts, 1935, p. 43, which provides as follows:

"Section 4. That any County Officer violating any of the provisions of this Act shall be guilty of a misdemeanor and on conviction shall be fined not less than \$50.00 (fifty dollars) nor more than \$500.00 (five hundred dollars). A continued failure and/or refusal on the part of such officer, as a liability on his official bond for neglect of duty, to a penalty of not less than \$50.00 (fifty dollars) nor more than \$100.00 (one hundred dollars) per month for the period of such failure."

I express no opinion as to the constitutional validity of Section 4, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 26, 1938.

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

County Commissioners without authority to send tractor drivers to a school that trains them in tractor operation and mechanics.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry, to which this opinion is addressed, as follows:

"The State Examiners recently completed an examination of the records of the Court of County Commissioners and the County Depository for the fiscal period from October 1, 1936 to September 30, 1937, and they charged one of the County Commissioners with the sum of \$22.50 for expenses paid for county road employees while attending a free tractor school in Montgomery, referring me to the opinion of your office which is found in Volume 8, at page 163.

"Please refer to this opinion. No doubt, there is an absence of any specific provision in the laws of Alabama for the payment of such expense, but I feel that a more liberal construction of the law should be given in a matter of this nature.

"The claim of this Commissioner was regularly filed, audited and allowed before payment from the Gasoline Tax Funds, and as I understand the law, the Gasoline Tax Funds are to be used exclusively for the supervision, maintenance, construction and repair of county roads and bridges. The Commissioner sent these regular county road employees to this free tractor school to receive instructions as to the operation and maintenance of their tractors and road machine in order that they might be able to operate and care for them more efficiently and to learn up to date methods in road repairing and maintenance. The benefits derived from the courses of instructions given by these schools would naturally inure to the benefit of the county and therefore, I am unable to understand why such an expenditure should be classed as an illegal one.

"The Court of County Commissioners is authorized to send its Attorney, Clerks, Road Engineers and others it may designate, to the conventions of the Association of County Commissioners for the purpose of receiving instructional and educational information with regard to county governmental and road matters and the expenses of those so sent are classed as valid claims against the Road & Bridge Fund.

"It appears to me that the expenses of the road employees who are sent to tractor schools and the expenses of county officers and employees who are sent to attend the conventions of the Association of County Commissioners, all being for the benefit and common good of the county and the taxpayers, they would certainly come to be classed in the same category and should be treated accordingly.

"Your early expression and official opinion on this matter will be appreciated."

The opinion of this office, dated August 18, 1937, addressed to Hon. Charles W. Lee, State Comptroller, Capitol, reported in the Quarterly Report of the Attorney General, Volume 8, page 163, answers your request in the negative, and to that conclusion I still adhere.

However, in elaboration thereof, prompted by your inquiry, it is my view that an employee of the county who performs day labor in the operation of a grading machine and tractor, or who services a tractor used in the grading and maintenance of roads in a county, is quite a different person, in the perspective of the law so far as duties and authority are concerned, from a county commissioner who was elected by the people to exercise general superintendence over the roads of the county, and is quite different from a person, so far as duties are concerned, who is employed as an engineer, or in some other capacity, to assist the county commissioners in the performance of superintendence over roads pursuant to Section 1397 (110), Michie's Alabama Code, 1928, from which I quote as follows:

"The courts of county commissioners, boards of revenues, or other like governing bodies of the several counties of this State have **general superintendence** of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable." (Emphasis ours).

This office has held in an opinion, dated May 10, 1935, to Hon. J. W. Heustess, Clerk, Board of Revenue, Montgomery, Alabama, that the Court of County Commissioners is vested with authority, under Section 1397 (110), supra, to pay the needful and necessary expenses of its members incidental to attending the meeting of the Association of County Commissioners of Alabama, to that end that they may attend educational lectures, exhibits, and demonstrations at said meetings, thus advancing the economics of road construction and maintenance. This opinion, and others similar in character, are predicated largely upon the idea that such attendance will better enable the commissioners to exercise and perform the powers of general superintendence over road construction and maintenance, and to that objective, the statute, broad in its provisions, authorizes all of the needful and necessary expenses. Such reasoning has application to those persons employed by the county to assist the commissioners in the exercise of that general superintendence in the matter of road construction and maintenance.

The employees mentioned in your letter have no identity with that superintendence vested in the commissioners over road and bridge construction and maintenance, but on the other hand such employees are engaged only to perform the work designated by the commissioners and their assistants pursuant to their powers of general superintendence vested by law. The salary of these employees may be decreased or increased, at the will of the commissioners, in harmony with their ability, and compensatory with the expenses they have incurred and paid out of their own pocket while attending a free school that offers training in tractor operation and mechanics.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 26, 1938.

Dr. J. N. Baker,
State Health Officer.
Capitol.

1. Dogs may be inoculated at any time by the Rabies Inspector, by a competent veterinarian, or other person duly qualified by the County Board of Health.

2. Where a dog has not been inoculated prior to the date fixed by the Rabies Inspector and the State Health Officer, the owner of the dog is liable for a fee of fifty cents, in addition to the cost of inoculation, in cases where the dog is found running at large and is apprehended by a person charged with the enforcement of the act.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of August 16, 1938, which is as follows:

"The Dog Control Act (Act No. 200, General and Local Acts, Extra Session 1936-1937, page 230) provides in Section 3 that 'On or before a day fixed annually by the Rabies Inspector of each county, with the approval of the State Health Officer, every owner of a dog, not confined at all times to an enclosed area, or on leash, or muzzled, shall cause such dog to be inoculated against rabies by the Rabies Inspector, by a competent veterinarian, or other person duly qualified by the respective county boards of health . . .'

"It is further provided in Section 7 that 'On or after the date annually fixed by the Rabies Inspector, any dog found running at large, and not wearing the evidence of inoculation as provided therein, and for which no certificate can be produced . . . shall forthwith be subject to a penalty of 50c, to be imposed by the Rabies Inspector on the owner of said dog . . .'

"In the light of these requirements, I beg to ask your opinion on the following points:

"1. After the penalty period has become operative, may any one other than the duly appointed Rabies Inspector inoculate dogs?

"2. Can a competent veterinarian, referred to above, inoculate for 50c after the penalty period has become operative, thus abetting the violation of the Act?

"3. If a competent veterinarian can inoculate dogs after the penalty period has become operative, is it incumbent on such veterinarian to collect the penalty?"

I am of the opinion that your first and second inquiries should be answered in the affirmative. Section 3 of the so-called said Dog Control Act is the only provision of law which authorizes any particular person or per-

sons to inoculate dogs. It is my judgment that persons specified therein may inoculate dogs at any time during the year, whether it be before the date annually fixed by the Rabies Inspector and State Health Officer, or subsequent thereto. The date fixed as a deadline is merely for the purpose of the enforcement of the Act and was not intended to restrict the persons named therein in their operation.

In answer to your third inquiry, I am of the opinion that it is not incumbent upon a veterinarian to collect the penalty fee in cases where the owner of the dog takes it to the veterinarian for inoculation, even though the penalty date has expired. In my judgment, the penalty provided in Section 7 of the Act attaches only when a dog is found running at large and is apprehended by an officer or other person charged with the enforcement of the Act. The penalty fee is to be turned over to the person making the apprehension. It is my opinion that the owner of a dog which has been apprehended must pay the fifty cent penalty fee in addition to the inoculation fee provided by Section 6 of the Act, but that said owner may have the dog inoculated by the Rabies Inspector or any other person qualified under the provisions of Section 3 of the Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 31, 1938.

Mrs. C. F. Hart,
Tax Assessor,
Covington County,
Andalusia, Alabama.

Taxation—Municipally owned real estate—

Under Section 91 of the Constitution, real property acquired by a municipal corporation by means of redemption of the same from State (which was purchaser at tax sale) in order to protect municipal claim for taxes thereon, is exempt from state and county taxes during the period that it is so held by the municipality.

Opinion by Assistant Attorney General Rowe.

Dear Mrs. Hart:

I have your request for opinion as follows:

"The property of Mrs. Anna Riley sold to the State for 1936 tax and the City of Andalusia, to protect its city tax, redeemed this property from the State and the Probate Judge turned this redemption over to me. To whom should I assess this property, as city property is not taxable."

In my opinion the property ought not to be assessed for taxation as long as it is held by the City of Andalusia.

Under Section 91 of the Constitution, the real and personal property belonging to municipal corporations are exempt from taxation. This constitutional exemption has been liberally construed by the Supreme Court. In a recent pronouncement, In Re Opinions of the Justices, 179 So. 535, the Court held that property acquired by Municipal Housing Authorities in connection with slum clearance projects, is exempt under said constitutional provision. By analogy, it would seem, if the municipal corporation acquires the property for any municipal purpose, or pursuant to any statutory authority for such acquisition, the exemption applies. Cf. Quarterly Report of Attorney General, Vol. III, page 134, and Vol. X, pages 105-106.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 1, 1938.

Hon. G. H. Howard,
Probate Judge of Elmore County,
Wetumpka, Alabama.

Public Funds—

Commissioners Court of Elmore County may legally appropriate money for the erection of public buildings in the county to be used for Home Demonstration Agents, but not for Parent Teachers Association meetings, provided there is no room in the courthouse of other public buildings for said agents and the court has decided that such appropriations would save the county money as the county would have to rent buildings to house said agents.

County Board of Education of Elmore County has no authority to appropriate funds for the erection of buildings to be used by the Home Demonstration Agents and the Parent Teachers Associations.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of recent date in which you request my opinion as follows:

"Please advise whether or not the Commissioners Court can legally appropriate money for erection of buildings in the county to be used for Home Demonstration Agent purposes and for Parent Teachers Association meetings.

"Advise us also whether or not the Board of Education can legally appropriate money for the same purposes.

"Also advise us in case of making such appropriation whether by Commissioners Court or Board of Education, if a deed must be made to the County; and if the Board of Education should jointly with the Com-

missioners Court make such appropriation, should the deed be made to both the County and Board of Education, or in such case how should deed be made if required."

It is my opinion that the Commissioners Court may legally appropriate money for the erection of public buildings in the county to be used for Home Demonstration Agents, provided there is no room in the courthouse or other public buildings for said agents, and the court has decided that such appropriations would save the county money as the county would have to rent buildings to house said agents.

Section 212 of the 1923 Code of Alabama provides in part as follows:

"ERECTION OF COUNTY BUILDINGS.—The courts of county commissioners and boards of revenue of the respective counties shall erect courthouses, jails and hospitals, and other necessary county buildings
* * * "

In my opinion, such buildings subject to the qualification as enumerated, supra, would come within the term "and other necessary county buildings" as used in Section 212, supra.

This office in an opinion to Hon. J. S. Van Valkenburg, Chairman, Board of Commissioners, under date of May 14, 1937, **Quarterly Reports of Attorney General**, Vol. VII, p. 137, held that the Court of County Commissioners of Madison County was authorized to purchase land upon which to erect public buildings to house the County Health Officer and the County Farm and Home Demonstration Agents.

I am unable to find authority for the Court of County Commissioners to contribute funds for the erection of buildings for Parent Teachers Association meetings.

The title to the land upon which said buildings are to be erected should be in the county before any appropriations are made by the Commissioners Court.

In my opinion, the County Board of Education has no authority to appropriate funds for the erection of buildings to be used by the Home Demonstration Agents and the Parent Teachers Association as such use would not be for school purposes as contemplated by Section 132 of the 1927 School Code, which provides in part as follows:

"POWERS OF COUNTY BOARD.—The County Board of Education shall have the right to acquire, purchase, or by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. * * * "

Public funds can never be expended unless there is expressed or necessarily implied authority for the expenditure. **Quarterly Report of Attorney General**, Vol. IX, p. 145; **Quarterly Reports of Attorney General**, Vol. 1, p. 304; **Biennial Report of Attorney General**, 1928-1930, pp. 826-981.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 1, 1938.

Hon. James A. Crane,
Register in Chancery,
Mobile, Alabama.

Trial Tax—Municipal assessment cases—Section 9, General Revenue Act of 1935, General Acts of 1935, p. 263.

Municipalities exempt from payment of trial tax on cases filed in the Circuit Court in Equity to collect street paving, white way, and sidewalk improvement assessments.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry as follows:

"Will you please look at page 8, Section 9 of the Revenue Bill of 1935 and give me your opinion as to whether I shall charge a trial tax fee in cases filed by the city against property owners, for the collection of street paving assessment, white way assessment, sidewalk improvement assessment.

"A large number of these cases were filed with me today and people are asking for bills, and for this reason I am asking you to let me hear from you as soon as you can."

It is my opinion that the City of Mobile is exempt from the payment of trial tax on the suits which it filed, as stated in your letter, to collect street paving, white way, and sidewalk improvement assessments.

Although the original act (Acts of 1919, p. 282, Section 4½) did not so provide, Section 9, General Acts of 1935, page 263, imposing a trial tax of \$3.00 on all cases pending or filed in the Circuit Court of Alabama, contains a provision as follows:

" * * * This trial tax fee shall not, however, be imposed or collected in cases made by any city or town, as a result of the filing by the clerk or other officer of such city or town with the Register of the Circuit Court or like officer of a court of the county having equity jurisdiction, of a list of delinquent taxpayers and property upon which city or town taxes are due as is now or may hereafter be required by law; nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax has been imposed, and cases for municipal assessments shall not be subject to such tax, and tax cases." (Emphasis ours).

The aforequoted portion of Section 9, supra, imposing a trial tax, in the beginning exempts cases filed to collect municipal and ad valorem taxes, and at the conclusion exemption is granted to cases of municipal assessments, and tax cases.

Exemption already having been granted to cases for the collection of municipal ad valorem taxes which are certified to the Register for foreclosure as authorized by Section 2134-35, Code of Alabama, 1923, it is evident that the Legislature intended to exempt cases involving all types of assessments and taxes, including those mentioned in your inquiry; otherwise, there would have been no necessity, if only cases to collect ad valorem taxes were exempted, to broaden the exemption so as to include all cases for municipal assessments, as well as all other tax cases. Therefore, cases filed to collect the assessments are not subject to trial tax.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1938.

Hon. S. L. Johnson, Clerk & Register,
Circuit Court of Calhoun County,
Anniston, Alabama.

Witnesses—Grand Jury Witnesses—Fees.

1. Where a Grand Jury does not find an indictment, the witnesses appearing before the same are to be paid from the fine and forfeiture fund of the county.

2. Where an indictment is found by the Grand Jury and the defendant is remanded to the Juvenile Court or the court declares the defendant insane, the fees of the witnesses appearing before the Grand Jury are to be paid from the fine and forfeiture fund of the county.

3. Where an indictment found by the Grand Jury is ordered withdrawn and filed, fees of the witnesses appearing before the Grand Jury are to be paid from the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of recent date wherein you request my opinion as follows:

“Will you kindly answer the following questions as to witness fees:

“In an investigation by the Grand Jury witnesses are summoned and given attendance certificates and the Grand Jury does not bring in a true bill nor declare no bill but makes certain recommendations, how are these witnesses to be paid?

“Second, in a case where the witnesses are summoned by the Grand Jury and issued certificates of attendance and a true bill is found and

later the defendant is remanded to the Juvenile Court, or the Court declares the defendant insane and the defendant is sent to the insane asylum, how are the witnesses paid?

"Third, if in a case where the witnesses are summoned by the Grand Jury and issued certificates of attendance and a true bill is found and later the Court declares the defendant insane and orders the indictment withdrawn and filed until further orders of the court, how shall the the witnesses be paid?"

The answer to your inquiries is governed by the provisions of Section 3763, Code of Alabama, 1923. This Section provides as follows:

"Section 3763. HOW TAXED AND PAID.—The fees of witness, subpoenaed on the part of the state to appear before the grand jury, or before any court in which a criminal prosecution is pending, must be taxed against the defendant, if he is convicted, or against the prosecutor when the costs are imposed on him; but if the defendant is not convicted, and the costs are not imposed on the prosecutor, or if the indictment is withdrawn and filed, or the prosecution abated by the death of the defendant, or if the costs are imposed on either the defendant or the prosecutor, and an execution against him for the same is returned 'no property found', or if no indictment is found by the grand jury before whom the witnesses appear, or if a nolle prosequi is entered in the case, such fees must be paid by the county in the manner specified in Section 3769."

In reference to your first inquiry, you will note that the above quoted section provides that if no indictment is found by the Grand Jury before whom the witness appeared, the fees of these witnesses must be paid by the county in the manner specified in Section 3769 of the Code, 1923. This Section makes the fees of such witnesses payable from the fine and forfeiture fund of the county. (See opinion of Attorney General, Vol. X, p. 65).

In reference to your second inquiry, you will note that Section 3763 provides that if the defendant is not convicted, then the fees of the witnesses are paid as is specified in Section 3769, namely from the fine and forfeiture fund of the county. As is stated by you, where an indictment is found and the defendant is remanded to the Juvenile Court or declared insane, it is my opinion he has not been convicted of the charge placed against him by the indictment found by the Grand Jury. (See opinion of Attorney General to Sheriff, Chilton County on July 12, 1935). I am therefore of the opinion that the witnesses appearing before the Grand Jury in such a case would be paid from the fine and forfeiture fund of the county.

In reference to your third inquiry, you will note that Section 3763, supra, provides that if the indictment is withdrawn and filed, the fees of the witnesses appearing before the Grand Jury must be paid by the county as set forth in Section 3769. I am of the opinion that the facts stated by you in your third inquiry, come under this provision contained in Section 3763 and therefore the fees of the witnesses would be payable from the fine and forfeiture fund of the county.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

County Financial Control Act, (Acts, 1935, p. 803)—Emergency obligations—

The re-equipping of the county courthouse is not such an emergency as is contemplated by Section 17 of the County Financial Control Act which authorizes the issuance of interest bearing warrants to meet emergency obligations.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"A certain county wishes to equip the entire courthouse with new equipment.

"Please advise if said county can issue interest bearing warrants under Section 17 of the County Financial Control Act, approved September 9, 1935, for said equipment?"

In my opinion, Section 17 of the County Financial Control Act (Acts, 1935, p. 803) affords no authority for the issuance of interest bearing warrants to re-equip the county courthouse.

Said Section 17 provides:

"Section 17. EMERGENCIES. In the event any situation over which the Board of Revenue, County Commissioners or other like governing body has no control results in an appreciable obligation against the county over and above what said Board has reason to anticipate, and for which no moneys from the current year's income are available to pay, such board may issue its interest bearing warrants, as now authorized by law, in an amount sufficient to pay such emergency obligation. And the interest and maturities or principal of such loans shall constitute a part of the budget for the year in which they mature. But before such warrants shall be authorized or sold under this Section, such Board shall inquire into and find that such emergency obligation has accrued, and such finding spread upon the minutes of its proceedings."

However, in my opinion, re-equipping the courthouse is not such an "emergency" as is there dealt with.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1938.

Hon. Hamp Draper,
Associate Member,
State Board of Administration,
Montgomery, Alabama.

1. Section 3670, Code of 1923—Delivery to penitentiary officials complete when convict delivered to sheriff or person presenting order of Board of Administration, as provided by Section 3610.

2. Such delivery complete under Section 3670, although convict paroled before he actually enters Kilby Prison.

3. Costs payable under Section 3667 are payable by Convict Department only when convict has been delivered to the penitentiary officials as above defined.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

I have your letter of July 21st in which you request my official opinion as follows:

"The Convict Department respectfully request your opinion on the following questions.

"Define delivery to the penitentiary officials under Sec. 3670 of the 1923 Criminal Code.

"Would surrender or delivery to the Convict Department constitute delivery to the penitentiary officials under Sec. 3670 although subject was paroled by the Governor before he was entered as a prisoner at Kilby Prison?

"Would the Convict Department be held liable for Criminal Court costs payable under Sec. 3667 of the 1923 Criminal Code if a person convicted of either a felony or misdemeanor was not received by the penitentiary officials which authorizes such payment under Sec. 3670 Criminal Code of 1923?"

Before answering the specific questions set out in your letter, I would like to call your attention to some of the law applicable.

Section 3667 of the Code of Alabama of 1923 appears in Article 3, Chapter 106, regulating the convict system. As originally enacted, this section provided for the payment of costs of conviction in felony cases (Acts of 1923, p. 734). Section 3670 regulated the manner in which such costs were paid and expressly provides:

"No costs shall be paid until the convict has been delivered to the penitentiary officials, and where a convict is sentenced in more than one

case, the costs in the succeeding case shall be paid when he is delivered to such officials."

This act of 1923 made no further reference to and did not purport to regulate the delivery of convicts to the penitentiary officials. For a proper answer to that question we are remitted to a consideration of the general law regulating convicts and the Convict Department. By Section 3582 it is provided that the State Board of Administration shall have the general supervision and control of state and county convicts. Section 3585, regulating the duties of the President of the Board of Administration, provides that he shall superintend the management of the convicts and all subordinate officers, persons or guards. It is made his duty to see that the laws regulating convicts are enforced and it is further provided that he may transfer prisoners from one to another penitentiary as he deems expedient. Section 3608 expressly provides that each prison or penitentiary shall be under the control of such officers as the Board of Administration shall think necessary. This clearly makes the penitentiary officials the agents or employees of the Board of Administration. The entire chapter regulating the convict system continues the policy set out in the above specific statutes, that is, that the convict system is under the entire management and control of the Board of Administration as regulated by these statutes.

The delivery of a convict after conviction is regulated by Sections 3609 and 3610, which provide as follows:

"Section 3609. When any convict is sentenced to the penitentiary, the judge of the court in which the sentence is had shall order such convict to be confined in the nearest secure jail; and the clerk of the court shall at once notify the president of the board of the jail where such convict is confined, and forward to him a copy of the judgment entry and sentence in the case, and inform him if any special care be necessary to guard such convict; and thereupon the president of the board shall direct where such convict be taken for confinement and hard labor."

"Section 3610. The sheriff having in his custody any person sentenced to the penitentiary, shall deliver such convict to the person who presents the written order of the president of the board and shall take from such person duplicate receipts upon blanks to be furnished by the board, containing a descriptive list of such convict, one of which he shall retain, and the other he shall forward to the board."

There are no other statutes of Alabama regulating the delivery of convicts, either state or county, to the penitentiary officials. As you know, by virtue of the Act of 1927, page 51, the laws applicable to state convicts were made applicable to county convicts. By Section 6 of this act it was provided that:

"The Courts of County Commissioners, Boards of Revenues, or other like bodies of the several counties of the state, may hereafter and they are hereby authorized and empowered to deliver to the State Board of Administration all county convicts heretofore sentenced to hard labor for the county or who may hereafter be sentenced to hard labor for the county in like manner as now provided by law for delivery of state convicts to the State Board of Administration. The State Board of Administration shall receive said county convicts in the same manner as they now receive state convicts, and shall pay to the proper county authori-

ties the items of costs provided in Section 3667 of the Code of Alabama as now provided by law."

1. Bearing in mind these above statutes, we proceed to a consideration of the specific questions raised by you. In my opinion, the phrase "delivery to the penitentiary officials" as used in Section 3670 is interchangeable with and identical in meaning with the words "delivered to the State Board of Administration" as used in Section 6 of the Act of 1927. These words are used interchangeably and, in my opinion, refer to the delivery as specifically defined and regulated by Section 3610, above quoted. It is, therefore, my opinion that delivery to the penitentiary officials as required by Section 3670 is made the instant that the sheriff having the convict in custody delivers such convict to the agent of the Board of Administration as regulated by Section 3610.

2. In my opinion, when this delivery is complete, the parole by the Governor before the convict actually enters Kilby Prison would not affect the right of the officers to costs or the duty of the State Board of Administration to pay such costs.

3. Section 3670 makes the payment of the costs under Section 3667 expressly conditioned upon the proper delivery of the convict to the proper officials. In my opinion, until proper delivery of the convict is made under Section 3610, there is no liability for the payment of such costs. Nothing herein contained shall be construed as authorizing or approving any act of the Board of Administration, or any of its agents, refusing to accept the proper delivery of a convict and in this manner attempt to prevent the payment of legal costs. I have cited to you the statutes requiring the President of the Board to direct where the convict shall be taken and requiring the delivery by the sheriff to the agent of the Board of Administration. These are duties placed upon the Board by law, and the failure of the Board to perform such duties would render them subject to court action requiring the proper performance thereof. I do not mean to insinuate that any member of the Board of Administration would wilfully fail to perform their duty in this regard, but I merely wish to make myself clear that while the payment of costs is expressly conditioned upon delivery to the proper officials, it is made the duty of the Board to supervise and arrange this delivery properly and the failure of the Board or its members to perform their duty properly should not prevent the right of the various officials to their properly earned costs.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 3, 1938.

Hon. H. D. Lynes,
Sheriff, Washington County,
Chatom, Alabama.

A watchman must be provided for the county jail to be named by the sheriff unless a written order is made by the State prison inspector to the contrary.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 10, 1938, in which you request my opinion as follows:

"I have hired a night watchman to watch the jail. I have employed this man under Section 4879, Code of Alabama, 1923, and opinion by Assistant Attorney General Haynes of March 4, 1936. The Board of County Commissioners has refused to pay this man for his services.

"Is this a legal claim?"

Answering the above request, permit me to call your attention to Section 4879, Code of Alabama, 1923, which is as follows:

"Section 4879. DEPUTY OR WATCHMAN MUST BE IN ATTENDANCE.—Prisoners shall not be confined in any jail or prison in this state when such jail or prison is not provided with a deputy watchman or attendant, whose duty it shall be to watch the jail or prison at night for the prevention of escapes, and fire, and to aid in case of sickness among the prisoners, and who shall have access to the jail or prison and to the prisoners. If the state prison inspector is satisfied, after inspection, that the construction and management of a jail is such as to render a night watchman unnecessary, he may by written order to the sheriff suspend the appointment of said watchman, this order to be subject to revocation at the discretion of the prison inspector. The sheriff, in case of a county jail, or the proper governing body, in case of a municipal jail, shall appoint, direct and control said deputy, watchman or guard, and the court of county commissioners or board of revenue, or the proper municipal governing authority, as the case may be, shall fix a reasonable salary and the same shall be paid out of the funds of the county or of the municipality, if it be a town or city jail, in which the jail is located."

This office has held time and again that the appointment of a watchman for the county jail is indispensable, and that such a watchman must be provided unless the prison inspector makes a written order to the contrary. Of course, the statute gives the county commissioners or board of revenue, or like governing body the authority to fix his compensation, which must be reasonable. Therefore, unless there has been a written order from the State prison inspector to the contrary, your claim, if it is reasonable, should be and must be allowed for the services of such watchman. *Quarterly Report of Attorney General, Vol. II, p. 263.*

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 7, 1938.

Hon. B. M. Davis,
Tax Assessor,
Cherokee County,
Centre, Alabama.

Hon. J. W. Graham,
Tax Collector,
Cherokee County,
Centre, Alabama.
Taxation—

1. Costs of printed notices to be posted in five or more public places in each election precinct, by the Tax Assessor and Tax Collector, in accordance with the provisions of Sections 30 and 157 of the 1935 Revenue Act should be paid for by the county.

2. Costs of newspaper notice required to be given by the Tax Assessor and Tax Collector in accordance with the provisions of Sections 30 and 157 of the 1935 Revenue Act should be paid for by the county.

3. Costs of printed blanks to be used by Tax Collector in making written demand on delinquent taxpayers as provided by Section 164 of the 1935 Revenue Act should be paid for by the county.

Opinion by Assistant Attorney General Garrett.

Dear Sirs:

I have your letter which reads as follows:

"Section 30 of the Revenue Code of 1935 in part provides:

" 'The Assessor shall give at least ten days notice by advertisement in a newspaper, if there be one published in the County, and by bill posted in five or more public places in each election precinct, of the time when he will attend to receive the tax returns.' "

"In attempting to comply with this requirement we as Assessor and Collector, respectively, jointly had a sufficient number of bills printed, for the purpose of posting at five or more public places in each election precinct, and submitted to the Court of County Commissioners the bill for the cost of printing the same. The Court of County Commissioners refused to pay this bill.

"Please give us your opinion if this bill for printing is a legal charge against the county, and if same can be paid by the Commissioners Court.

"In further compliance with said requirement of law, we as such Assessor and Collector, respectively, jointly gave ten days notice by advertisement in the Coosa River News, a newspaper published in Cherokee County, Alabama, of the time when we would attend to and receive tax returns. We submitted to the Court of County Commissioners the bill for advertising and said Court refused to pay the same.

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"Please advise if his bill for advertising of said notice is a legal charge against the County, and if the Commissioners Court can order the same paid.

"Section 164 of the Revenue Code of 1935 provides:

"After the first day of January the Collector must make a demand in writing upon delinquent taxpayers, or their agents charged with the duty of paying their taxes, whenever they may be found, for the amount of taxes and fees and when unable to find them, to make a demand by registered mail directed to his last known place of residence or business, return card demanded."

"In order to carry out this provision of the law the undersigned John W. Graham, as Collector, had printed a necessary supply of written demands to be mailed delinquent taxpayers. The bill for the printing of these written demands were submitted to the Court of County Commissioners and they refused to pay the same.

"Please advise if this bill for printing these demands is a legal charge against the county, and if the Commissioners Court has authority to pay the same."

The printed bills or notices to which you refer in the first part of your letter are the bills or notices which the Tax Assessor and Tax Collector are required to give by Sections 30 and 157 of the 1935 Revenue Act, respectively. These sections require the Tax Assessor and Tax Collector, respectively, to visit each precinct of the county for the purpose therein stated, and to advertise these visits, unless relieved of such duty by proper resolution of the Court of County Commissioners. The advertisement of these visits required to be given must be both by publication in a newspaper and by bills posted at five or more public places in each election precinct.

Section 28 of the 1935 Revenue Act reads as follows:

"It shall be the duty of the courts of county commissioners or boards of revenue of the several counties in this state to supply the Tax Assessor, Tax Collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this Article, with all necessary books, stationery and printed blanks for the proper conduct of their several offices."

This office has previously held in an opinion to Hon. Hunter Phillips, Tax Assessor, Choctaw County, Butler, Alabama, under date of February 21, 1938, Quarterly Report of Attorney General, Vol. X, page 103, that under said Section 28 the bills or notices required to be posted in each election precinct by the Tax Assessor and Tax Collector in accordance with the provisions of Sections 30 and 157, supra, should be paid for by the county, if said bills or notices are made on stationery or printed blanks. Therefore, it is my opinion that your bill for the printing of these bills or notices required by Sections 30 and 157, supra, is a legal charge against the county and should be paid for by the county.

You next ask whether or not a bill for the advertisement in a newspaper required to be given by the Tax Assessor and Tax Collector by Sections 30 and 157, supra, is a legal charge against the county.

In my answer to your first inquiry I have pointed out that Sections 30 and 157, *supra*, require the Tax Assessor and Tax Collector to give this newspaper notice.

The decisions of the Supreme Court of Alabama are to the effect that the county is liable for only those claims which the law imposes or authorizes to be contracted, but that it is liable for those claims. **Ensley Motor Car Co. v. O'Rear**, 196 Ala. 481, and cases therein cited.

In the instant case, the law imposes the duty upon the Tax Assessor and Tax Collector of giving this newspaper advertisement. Therefore, I am of the opinion that the county is liable for the expense of such newspaper notices, and that the bill for such notices should be paid by the county. It is further my opinion that the rate which should be paid for such notices is governed by Section 9262 of the Code of Alabama, 1923. Cf. Opinion to the Judge of Probate, Etowah County, Gadsden, Alabama, under date of September 8, 1930, Biennial Report of Attorney General 1928-30, page 916, wherein it was held that the costs of publishing the list of qualified electors of the county in a newspaper should be paid for by the county since the law imposes the duty upon the Judge of Probate of publishing such list in a newspaper in every even numbered year.

Your next question is whether or not a bill for the printing of blanks on which the Tax Collector makes written demand on a delinquent taxpayer in accordance with the provisions of Section 164 of the Revenue Act of 1935 is a legal charge against the county.

Section 164 of the 1935 Revenue Act provides:

"After the first day of January the Collector must make a personal demand in writing upon delinquent taxpayers, or their agents charged with the duty of paying their taxes, whenever they may be found, for the amount of their taxes and fees, and when unable to find them, to make a demand by registered mail directed to his last known place of residence or business, return card demanded. It shall be the duty of such delinquents forthwith to pay the taxes and fees assessed and charged against them. But failure to comply with the requirements of this Section shall not invalidate the title of any property sold for taxes."

It is my opinion that such a bill is a legal charge against the county and should be paid for by the county, under the authority of Section 28, *supra*. Opinion to Hon. Hunter Phillips, *supra*.

The holding of this opinion in answer to your second inquiry is not in conflict with the holding of the opinion to Hon. Hunter Phillips, *supra*. In that opinion, we were only dealing with the question of whether or not the county could pay the expenses, or any of them, incurred by the Tax Assessor and Tax Collector in the performance of the duties required of them by Sections 30 and 157, *supra*, respectively, under Section 28, *supra*, and were not dealing with, and did not consider, the question of whether or not the county could pay these expenses, or any of them, pursuant to any other provision of law.

The opinion to Hon. U. B. Sullivan, Tax Collector of Pickens County, under date of July 17, 1936, Quarterly Report Attorney General, Vol. IV, page 47, is modified to conform hereto.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 7, 1938.

Hon. R. C. Derby, Tax Assessor.
Sumter County,
Livingston, Alabama.

Municipal Taxation.

Section 201—Revenue Act of Alabama—Schedule 158.12, Section 348, Article 13, Revenue Act of 1935.

1. Tax Assessor of Sumter County, whose services are invoked by ordinance, dated July 20, 1938, to assess municipal taxes for the City of Livingston, is required to assess such taxes due on December 1, 1938, on forms to be furnished by the City.

2. Tax Assessor of Sumter County, in reporting to the Tax Collector the amount of municipal taxes due December 1, 1938, which he was, by ordinance of the City of Livingston, dated July 20, 1938, required to assess, must use separate abstract book to be furnished by the City of Livingston.

3. Assessment of automobile taxes for City of Livingston is controlled by the provisions of Schedule 158.12, Section 348, Article 13, Revenue Act of 1935.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Your inquiry of recent date, to which this opinion is addressed is as follows:

"I am enclosing you copy of an Ordinance passed by the Town Council of Livingston on July 20th. I would like to have your opinion whether or not this ordinance would apply for the town tax for the year 1938. It was passed after the time set forth, both in Secs. 50 & 75 Revenue Acts 1935. I cannot see how the Assessor can perform any act of equalization after July 20th, as such work had been already completed on that date. Section 2124, Code of 1923, sets forth that after the first day of October cities and towns may levy taxes upon all property and subjects of taxation liable therefor. Section 3095 provides for the assessment of taxes due.

"The difference in the working of these two Sections brings up the thought that these two sections may apply one to each of the two towns or cities which have a different basis for assessment. The one for previous year, and the other for current year.

"Second, If this tax is to be handled just as would be a special district school tax, will I have to make separate copies of each and every assessment liable for the city tax, or can I place same on the original assessment sheet as in the case of special district school taxes? In the event you should rule that I should handle it all together from the State and County assessment lists, shall I put the same on the State Abstract book and how shall I notify the Collector of the amount of taxes he is charged with?

"These questions seem a little wild but there is nothing in the book that I can find setting forth any form for handling same.

"P. S. In case you rule that this has to be done by the Assessor for 1938, will or will not a special ordinance be required for the assessing of automobile taxes?"

Inasmuch as the ordinance of the City of Livingston, invoking the aid of Section 201, Revenue Act of Alabama, (formerly Section 3095, Code of 1923), which section, upon the aid thereof being invoked, requires you to assess municipal taxes, was not passed until July 20, 1938, at which time, as I assume from your letter, you had already completed your State and County assessments and your report thereof to the Tax Collector, it is my opinion that you would not be required to assess said taxes except upon forms to be furnished by the City of Livingston.

Amendment Number 8 to the Constitution of Alabama commands the valuations of property subject to municipal taxation of the City of Livingston to be "based on the valuation of such property as assessed for State taxes for the tax year ending on the 30th day of September, next succeeding the levy * * * ." I respectfully refer you to an opinion of this office dated December 14, 1936, addressed to Mrs. C. F. Hart, Tax Collector of Covington County, Andalusia, Alabama, reported in Vol. 5, Quarterly Reports of the Attorney General, p. 119, which has application to the valuations which you are required to use.

Although you may use the current assessments made for the State and County as a basis for the tax valuations of the municipal property in the City of Livingston, and even though you could lawfully include such assessments on the same blank which you use to make the State and County assessments, a point which I am not deciding at this time, you could not, in my judgment, after you have completed your assessments and the return thereof made for the Tax Collector, be required to amend the returns so as to include thereon the municipal assessments which you are required to make. The inclusion of the State, County and municipal assessments on one sheet, even though permissive, would certainly not be mandatory after State and County assessments have been made final. You would have no authority at this late date to amend the returns made by the taxpayers for State and County taxes, although you would be within your lawful authority, and are required, to assess the municipal taxes for the City of Livingston after completion of the assessments for State and County taxes.

I call your attention to the opinion to Mrs. C. F. Hart, supra, from which I quote as follows:

"Answering question two it is my opinion that there is no necessity to return the assessments to the city council where the assessments are made under Section 201 of the Revenue Code of 1935 or Section 3095 of the 1923 Code.

"Answering question three it would seem that the notice issued for state and county taxes would be sufficient to the taxpayer for city taxes as the valuation is identical.

"Answering question four I do not think in making these assessments for city taxes you are required to make any other report to the Board of Revenue, nor are you required to take any further action than that required for state and county taxes."

It is my opinion that the same reasoning which I have already set forth would apply to the report of such municipal taxes that you are required to make to the Tax Collector of your County. Such report should be on an abstract book to be furnished by the City of Livingston, as it is not feasible at this late date to change your abstract of the state and county taxes so as to include the amount of taxes due on municipal assessments, even though such inclusion is permissible—a point not pertinent thereto.

Answering your postscript, it is my opinion that the assessment of automobile taxes for the City of Livingston is controlled exclusively by the provisions of Schedule 158.12, Section 348, Article 13, Revenue Act of 1935.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

Sepetember 7, 1938.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Subpoenas—When staff members of the Department of Public Health are amenable to subpoenas.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I wish to acknowledge receipt of your letter of recent date in which you state:

"From time to time members of this staff are summoned to appear in court in various parts of the State in either of two capacities: (1) They

may be summoned to testify in some matter pertaining to the work of the department; or (2) They may be summoned as private individuals with reference to matters on which they have information. In either of these cases it is often very disrupting to the work of the department as those summoned may be engaged in a special technical project in a section of the State far removed from the scene of the trial.

"Under what circumstances, in each of the above cases, are staff members required to obey summonses?

"If a staff member is required to answer a summons, and such summons also orders him to produce certain records of the department, is it ever necessary for the member summoned to carry with him any public records; or must the person requiring same be content with certified copies of the record?

"The State Department of Health is custodian of certain records which are not, strictly speaking, public ones; for example, records of laboratory tests made for physicians. Is not the work done for individual physicians of a confidential nature and protected by the same rules of law as apply between physician and patient?

"In a specific case, a member of the staff received a subpoena duces tecum, directing him to bring the records concerning a Wassermann test on an individual who is now dead. The summons was issued in a civil case and was for the benefit of a former employer of the deceased. Should the record in such case be produced? In this connection attention is directed to Section 1111 of the Code of 1923."

When members of your staff are subpoenaed to testify in criminal cases, it is my opinion that they have to obey the summons of the court without exception unless, as provided for by Section 5624, Code of Alabama, 1923, their depositions may be taken. This, however, can only be done with the consent in writing of the defendant therein involved, as neither the legislature nor the courts can deprive a defendant in a criminal prosecution of the privilege of being faced by his accuser or of the right to compel the attendance of witness to testify in his behalf. **Bush v State**, 168 Ala. 77, 53 So. 266.

In civil cases when members of your staff are summoned to testify as private citizens with reference to matters having nothing to do with their official duties or their duties relative to their employment and they are within one hundred miles of the place of trial, they must obey the summons of the court and appear as a witness unless they come within the provisions of Section 7744, Code of Alabama, 1923, and the party who summons them consent to have their testimony taken by deposition. It is in the discretion of the party who subpoenas a witness as to whether or not he must appear personally or by deposition. If your staff members are over one hundred miles from the place of trial, they cannot be subpoenaed to appear personally unless Section 7735 of the Code of Alabama, 1923 is complied with.

In reference to members of your staff being called to appear in court to testify as a witness to matters pertaining to their official duties or their work in connection with their official capacity, it is my opinion that generally they do not have to appear. That is, when a member of your staff

comes within the exception set forth in sub-division 6 of Section 7744. Code of Alabama, 1923, which provides in part as follows:

"Sub-division 6. When the witness is the governor, secretary of state, state treasurer, state auditor, attorney general, superintendent of education, commissioner of agriculture and industries, examiner of public accounts, or the head of any other department or bureau of the state government, * * * "

then their testimony must be taken by deposition.

You will note that this section names certain constitutional officers of the state and then contains the words, "or the heads of any other department or bureau of the state government." In my opinion this refers to any department created by the executive, and to the bureaus created within such department, and includes also the heads of the bureaus appointed by the executive of each department. The above is strictly limited to civil cases.

When a member of your staff is subpoenaed to produce certain records of the department, it is my opinion that a distinction must be made between public records and the other records on file in your office. Generally public records can only be secured to be used as testimony pursuant to Section 2696 of the Code of Alabama, 1923, which provides:

"Section 2696. Public officers bound to give copies.—Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

Further, the copies can be secured only in the manner therein set forth. It is only under unusual circumstances that the original record itself must be produced since there is a further provision applicable to public records used as testimony in Section 7681 of the Code, which provides:

"Section 7681. Transcript of books kept in office of any public officer, evidence.—All transcripts of books or papers or parts thereof, required by law to be kept in the office, custody or control of any public officer, agent, servant, or employee of any municipality, city, county, or of the State of Alabama, or of the United States, when certified by the proper custodian thereof, must be received in evidence in all courts; and it is no objection to such transcript that the book from which it is taken is a copy of office books belonging to the United States. All such officers under jurisdiction and laws of the State of Alabama, and counties and cities therein, shall furnish all such transcripts of any documents, official books and papers in their possession, custody or control, when requested to do so by any person, firm or corporation, tendering to such officer or custodian of such records, the proper amount of fees and charges required or necessary to pay for the making of such transcripts."

The distinction to be made is that made by Section 2696, supra, in the provision, "public writings which the public has a right to inspect;" and it is my opinion that this refers to public records which have been defined as follows:

"Strictly speaking, a public record is one made by a public officer in pursuance of duty, the immediate purpose of which is to disseminate information or serve as a memorial of official transactions for public reference." **People v. Harnett**, 226 N. Y. S. 338.

See also opinion of this office addressed to Hon. Henry S. Long, President, State Tax Commission, dated July 11, 1935.

It is my opinion therefore, that your department only has to supply certified copies of **public** records kept by your department that you are not under a duty to supply copies of laboratory tests made for physicians or Wassermann tests made for individuals, unless the general public has a right to inspect these records, as it has been held in the case of **People v. Harnett**, *supra*, at p. 341.

"Reports of private individuals to government officials, even pursuant to a statute, correspondence of such officials in matters relating to private affairs of a citizen, although in connection with public business, or memoranda of public officers for their own convenience, are not public documents or records, unless made so by statute.

"It would be a startling proposition to public officers, and to the public as well, if they were informed that all citizens had the right in the absence of statute to the contrary, to search the files and records of all public officers, as it might suit their fancy."

However, if such reports of laboratory tests are competent legal evidence in any case, the production of same, may be required by a subpoena duces tecum under Section 7776 of the Code of 1923. This applicable to Wassermann test reports as well as others. Although Section 1111 of the Code of 1923 treats such reports as confidential, such, in my opinion does not except them from being competent legal evidence in some cases.

Please be further advised that there are no privileged communications between doctors and patients in Alabama.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 9, 1938.

Hon. W. H. Quillen, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Costs—Defendant cannot be imprisoned for a term in the county jail to pay the costs of court but he may be sentenced to hard labor to pay costs. Section 5291, Code of Alabama, 1923.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

This will acknowledge your letter of August 20, 1938, which is as follows:

"If a defendant is fined \$5.00 and costs for public drunkenness in the Law & Equity Court, the costs amounting to \$22.85, and the court sentences the defendant to ten days imprisonment in county jail to pay the fine as provided by Section 5290 Code 1923, does the court also have a right to sentence the defendant to a certain number of days imprisonment in county jail to pay the costs, said defendant having failed to pay the court costs?

"Does a court have a right to sentence a defendant to imprisonment in the county jail to pay court costs in misdemeanor case, in the event said defendant fails to pay court costs upon conviction? What section of the Code provides for the rate per day to be used in figuring the number of days imprisonment in the county jail required to pay court costs in misdemeanor cases?

"If a defendant pays court costs in a misdemeanor case by serving a jail sentence, who pays these costs into the fine and forfeiture fund of the county and how do the officers get their costs in such cases?"

In answer to your first two questions, it is my opinion that the court cannot sentence a defendant to imprisonment for a term in the county jail to pay the costs of court, but he may be sentenced to hard labor under Section 5291, Code of Alabama, 1923.

If a defendant is convicted of a misdemeanor and a fine is imposed, if the fine and costs are not paid or judgment confessed therefor, the court should proceed as follows:

The judge may sentence the defendant to jail or to hard labor to pay the fine in accordance with Section 5290 of the Code of Alabama, 1923, which section has been construed as applying only to sentences on account of the fine.—*Williams v. State*, 55 Ala. 166; *Ex parte Hill*, 122 Ala. 114.

The judge must sentence the defendant to hard labor to satisfy the costs. The only method of enforcing payment of costs, if not paid or judgment confessed is by sentence to hard labor for the county. Section 5291 of the Code of Alabama, 1923, provides as follows.

"Section 5291. When additional hard labor imposed for costs; rules in reference to.—If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, as provided by law, then the court may impose additional hard labor for the county for such period, not to exceed ten months, as may be sufficient to pay the costs, at the rate of seventy-five cents per day, and the court must determine the time required to work out such costs at that rate; and such convict must be discharged from the sentence against him for costs on the payment thereof, or any balance due thereon, by the hire of such convict, or otherwise; and the certificate of the judge or clerk in which the conviction was had, that the costs, or the residue thereof, after deducting the

amount realized from the hire of the convict, have been paid, or that the hire or labor of the convict, as the case may be, amounts to a sum sufficient to pay the costs, shall be sufficient evidence to authorize such discharge?"

It will be noted that the above quoted section states:

"If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, * * * "

However, this has been construed as being sufficiently broad to include cases where the defendant was convicted of a misdemeanor punishable by fine only, and there was no preliminary judgment imposing hard labor on nonpayment of the fine. — **Ex parte Etheridge**, 212 Ala., 466, 103 So. 66; **Tollison v. State**, 23 Ala. App. 528, 128 So. 464; **Ex parte Joice & Smith**, 88 Ala. 128.

There is no section in the Code of Alabama providing for the rate per day in computing the number of days imprisonment in the county jail required to pay court costs in misdemeanor cases for the reasons set out above. Section 5291, *supra*, applies only to sentences to hard labor for the county.

Since a defendant cannot pay court costs in a misdemeanor case by serving a term in jail, I believe that your last question is adequately answered.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 9, 1938.

Dr. A. H. Collins, Superintendent,
Department of Education,
Montgomery, Alabama.

Schools—County Board of Education authorized to make appropriation to county health departments to be used for public health services connected with school system from funds not specifically covered by Subsection 3 of Section 2 of the Minimum Program Act (Gen. Acts, 1935, pages 714, 717).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 1, 1938, in which you request my opinion as follows:

"In an opinion under date of June 25, 1938, to Mr. V. H. Wood, County Superintendent of Education, Franklin County, Russellville, Alabama, you held that a county board of education is without authority to make appropriation out of the minimum program fund to county health departments for public health services.

"Will you please advise me at your earliest convenience whether or not this opinion applies to all school funds available for appropriation by county boards of education."

In reply, I wish to state that the opinion referred to by you is applicable only to the minimum program fund and does not apply to those funds not included therein.

I specifically call your attention to Section 3 of the Minimum Program Fund Act (General Acts, 1935, page 714) relating to the method of determining the funds available to provide the program. Section 3 of said act provides as follows:

"3. DETERMINING THE FUNDS AVAILABLE TO PROVIDE THE PROGRAM.—The funds available to meet the cost of the seven months minimum program or of the program for whatever minimum term may be established by the State Board of Education shall be determined as follows: To the sum total of all funds from State appropriations and apportionments, available for elementary and secondary schools in any and all school systems in the county, add the total yield of an assessment of the three mill district tax in the several districts covering the whole county, and the total yield of an assessment of two mills of a county-wide school tax on all taxable property of the county. The total of these funds shall be considered the total funds available to meet the total cost of the seven months minimum program."

You will note that Section 3 includes in the minimum program fund all of the three-mill district tax authorized by Section 2 of Amendment III of the Constitution, but only includes two mills of the county-wide school tax authorized by Section I of said Amendment III. As you know, the counties are authorized to levy a special one-mill county school tax (Sections 253-260 of the School Code, 1927) as well as the special three mill county school tax authorized by Section 1 of Amendment III, of the Constitution. You will thus see that while there are possibly available to the county, funds from two three-mill levies and a one-mill levy, aggregating seven mills, only five mills of these seven are included in the minimum program fund. Three mills of the district tax are specifically included while the special one-mill tax and one mill of the county-wide three-mill tax or two mills of the county-wide three-mill tax are left without the scope of the minimum program fund and in my opinion may be used for "public school purposes". (Quarterly Reports of Attorney General, Vol. IX, pages 57, 60).

The question now arises as to whether or not an appropriation to the County Health Department for the exclusive use and benefit of the schools by the County Board of Education for public health services is an appropriation for "public school purposes." By Sections 8, 86 and 98 of the School Code of Alabama, educational matters affecting the county school system and the general administration and supervision of the public schools and of the educational interests of each county, are vested in and are under the control of the County Board of Education. The purpose of the entire educational system is to maintain efficient free public schools within the State of Alabama and within each county. As will be shown, the protection and promotion of the health of the school children is a necessary adjunct to this expressed purpose and in my judgment the county boards of education by implication possess the power to make such appropriations as are required to

accomplish that purpose. To paraphrase the statement in *State v. Brown*, 128 N. W. 294, education of a child means much more than merely communicating to it the contents of text books, but even if the term were to be so limited, some discretion must be used by the teacher in determining the amount of study of which each child is capable. The physical and mental powers of the individual are so interdependent that no system of education, although designed solely to develop mentality, would be complete which ignored bodily health. In line with these principles there has been established in the Department of Education a division of physical health education (Section 20 of the School Code, 1927), and Article XL (Sections 619-625) of the School Code of 1927 provides for the cooperation of county boards of education with county boards of health in the promotion of a physical program for the school children of the county.

The provision contained in the school code for the physical welfare of the children is peculiarly efficacious, for as a general rule, the immaturity of children renders their mental efforts largely dependent upon physical conditions. The school authorities and the teachers coming directly in contact with the children should have an accurate knowledge of each child's physical condition, for the benefit of the individual child, for the protection of the other children with reference to communicable diseases and conditions, and to permit an intelligent grading of the pupils.

All of the foregoing considerations, as well as many others unnecessary to mention, convince me that an appropriation to the County Health Department for the exclusive use and benefit of the schools, by the County Board of Education out of either that part of the Constitutional three-mill county-wide school tax available, or from the special county one-mill tax authorized by Section 253 et. seq., of the School Code, or such other funds as may be available to the county and are not specifically otherwise earmarked by the Minimum Program Act or by Section 3 of Act No. 326, approved September 2, 1935 (General Acts, 1935, pages 751, 752) is an expenditure for "public school purposes" and, therefore, justifiable under the law.

In all that has been said hereinabove, it is assumed, of course, that the appropriation to the County Health Department by the County Board of Education will be expended by the County Health Department exclusively for health work in connection with the County School system. Any other use would, in my opinion, be illegal.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 9, 1938.

Hon. Gaston Scott, President,
Alabama Highway Commission,
Capitol.

Highways and Highway Department—Act No. 339—General Acts of 1935, p. 773—Paving of streets through municipalities.

1. The State Highway Department of Alabama is authorized to pave, from curb to curb, irrespective of the width, the roadway, including the parking area, if a part of the roadway and used as such, of municipal streets "which will serve to connect the State Highway constructed or repaired by the State Highway Department within any town or municipality in the State of Alabama."

2. State Highway Department has no authority to install curb and gutter, or to pave sidewalks, on the streets of a municipality, except upon which a State educational or eleemosynary institution or the property thereof may front or abut.

Opinion by the Attorney General.

Dear Sir:

Reference is made to your inquiry from which I quote as follows:

"Your interpretation of the authority vested in the State Highway Commission by an Act of the Legislature on page 775 of the 1935 Acts, is requested. The Department wishes to be advised of the authority to construct and pave sidewalks and install curb and gutter in a municipality where such width between the curbs exceeds the paved width of the highway connected by such streets of the municipality. Reference is also made to the 1927 Highway Code in which a similar provision was also incorporated. Reference is made in the 1935 Act to a limit of 20 feet. Does this restrict the construction to an actual width of 20 feet within municipalities, or if the street is wider than the Department pave the entire width from curb to curb or is its authority restricted to 20 feet width? In many instances the actual roadway is 20 feet but the parking area on both sides would add several feet. Would it be permissible to pave this parking area under the above cited statute? Does it have authority to pave sidewalks beyond the curb and gutter along such streets?

"Please give this matter your prompt attention and advise as the Bureau of Public Roads has requested that we obtain a ruling from your office on this question."

The authority of your department for paving the roadways in a municipality, or for the construction of sidewalks, curbs and gutters, within the corporate limits of a city or town, is set forth and defined in Act No. 339, General Acts of 1935, p. 773, which is amendatory of Section 6 of Act No. 347, General Acts of 1927, p. 348. For the purpose of comparison, I am quoting Section 6 of the original Act along with the same section of the amendatory act, *supra*. The underscored words in the original section, as quoted herein, are not included in this section as amended, while the underscored words of the amended section, as quoted therein, were not included in the original section.

Section 6 of the original Act No. 347, *supra*, is as follows:

"DUTIES AND POWERS OF COMMISSION.—The state highway commission shall consider and determine all questions relating to the general policy of the state highway department and the conduct of its work

and in the performance of its duties. It shall be the duty of the department to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and maintain roads and bridges of this state; and shall have authority to make contracts, or agreements, to construct, or pave the roadway only of the street or streets, which will serve to connect the State Highways constructed or repaired by the State Highway Department, within any town, or municipality, **the population of which shall not exceed five thousand inhabitants, as given by the last Federal census;** and may also cooperate or contract with any municipality, or county **authorities** in the paving or improving **the roadway only**, of any street or highway upon which a State Educational or Eleemosynary Institution may front or abut, provided that, where such State Educational or Eleemosynary Institution, or the property thereof, fronts or abuts on both sides of the street or highway, **the roadway of which is to be paved or improved**, the State Highway Department is hereby authorized to, and shall, expend an amount of money sufficient to cover the entire cost thereof, and where such institution, or the property thereof, fronts or abuts on only one side of such street or highway, the said Department is hereby authorized to, and shall, expend an amount of money sufficient to cover only one half of the cost thereof; the State Highway Commission is authorized and empowered and may, with the approval of the Governor, enter into contract by bond or policy, with an Insurance Company authorized to do business in this State, covering a certain amount to be paid to the employees of the State Highway Department, actually engaged in the Construction, Maintaining or Repairing of Public Roads and Bridges, who by accidental means may be killed or injured. Provided that the amount paid to any such party on account of accidental death, or injury shall not exceed the amount or amounts as provided by the Compensation Act of this State. The premium upon such bond or policy shall be paid out of the funds of the State Highway Department as provided by law; and to that end and for that purpose the Department may with the consent and approval of the Governor disburse any monies hereby or otherwise appropriated or set apart for the construction, repair or maintenance of the public roads, bridges and highways of this State."

Section 6 of the amendatory Act No. 339, supra, reads as follows:

"**DUTIES AND POWERS OF COMMISSION.**—The State Highway Commission shall consider and determine all questions relating to the general policy of the State Highway Department and the conduct of its work and in the performance of its duties. It shall be the duty of the department to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and maintain roads and bridges of this State; and shall have authority to make contracts or agreements to construct, or pave the roadway only of the street or streets, which will serve to connect the State Highway constructed or repaired by the State Highway Department, within any town or municipality in the State of Alabama, and in such towns or municipalities in which the State Highway Commission has not designated the street or streets which are a part of the State Highways constructed or repaired by the State Highway Department it shall be the duty of the State Highway Commission to designate such street or streets and where the roadway of such street or streets was not in the corporate limits of such municipalities prior to the 26th day of August, 1927, but subsequently included in the corporate limits thereof by extending the city limits of such municipality by an Act of the Legislature, and which street or streets have been improved and paved with hard surface paving at the expense or credit of such towns or municipalities, or of the property owners

owning property abutting such street or streets, the State Highway Commission shall make such contracts or agreements as may be necessary to provide for payment by the State of the actual cost of such hard surfaced paving for a width of twenty feet, provided that the total amount shall not exceed \$50,000.00 for all of such towns or municipalities in which the city limits have been extended since August 26, 1927, by an Act of the Legislature, and the amount of \$50,000.00 shall be prorated among such cities and towns in proportion to the amount actually expended by them, and may also cooperate or contract with any municipality or county in in the paving or improving of any street or streets, highway or highways, walkway or walkways upon which a State educational or eleemosynary institution or the property thereof may front or abut, provided that where said State educational or eleemosynary institution or the property thereof fronts or abuts on both sides of such street or streets, highway or highways, walkway or walkways, the State Highway Department is hereby authorized to and shall expend an amount of money sufficient to cover the entire cost thereof, **provided further** that where such institution or the property fronts or abuts on only one side of such street or streets, highway or highways, walkway or walkways the said Department shall expend an amount of money sufficient to cover only one-half of the cost thereof. Provided, however, in such case, with the special approval of the Governor, said Department shall be authorized to expend a sum of money sufficient for the entire cost; and provided further the said Department may also, with the special approval of the Governor, **improve or pave any street or streets driveway or driveways (including curb and gutter) and walkway or walkways on, by or through the grounds upon which a State educational or eleemosynary institution is located and to pay the entire cost thereof, the State Highway Commission is authorized and empowered and may, with the approval of the Governor, enter into contract by bond or policy, with an Insurance Company authorized to do business in this State, covering a certain amount to be paid to the employees of the State Highway Department, actually engaged in the Construction, Maintaining or Repairing of Public Roads and Bridges, who by accidental means may be killed or injured. Provided that the amount paid to any such party on account of accidental death, or injury shall not exceed the amount or amounts as provided by the Compensation Act of this State. The premium upon such bond or policy shall be paid out of the funds of the State Highway Department as provided by law; and to that end and for that purpose the Department may with the consent and approval of the Governor disburse any monies hereby or otherwise appropriated or set apart for the construction, repair or maintenance of the public roads, bridges and highways of this State."**

It is my opinion that you are authorized, by the aforementioned amendatory act, to pave, from curb to curb, irrespective of the width, the entire roadway, including that portion set aside as a parking area, if a part of the roadway and so used, of municipal streets "which will serve to connect the State Highway constructed and repaired by the State Highway Department, within a town or municipality in the State of Alabama." This authority is granted by the specific terms of the amendatory act, in which I can find no restriction as to the width of such paving. The width of twenty feet mentioned in the Act as reference to certain reimbursements authorized to be made to municipalities who have theretofore expended certain funds in making street improvements. Whether or not the parking area is a part of the roadway and so used is a question of fact.

I can find no authority contained in the amendatory act, *supra*, or otherwise, for your Department to pave sidewalks or to install curb and gutter, in

a municipality except on streets upon which the property of a State educational or eleemosynary institution fronts or abuts. In the latter instance, you are authorized to construct sidewalks, curb and gutter in strict conformity with the terms of the aforementioned amendatory act.

The specific language of the original and amendatory acts granting authority to pave the sidewalks, and to install curb and gutter on streets upon which State educational or eleemosynary institutions front or abut, by implication excludes participation by the State Highway Department in other projects of a similar nature on streets upon which the property of such institutions does not front or abut.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 12, 1938.

Hon. A. H. Collins,
State Superintendent of Education,
Capitol.

General Contractors—A County Board of Education may let a contract for construction of a building to a general contractor, which said general contractor has been licensed by the State Licensing Board for General Contractors and had an application pending before said Board for a renewal of the license (it having expired), which had not been acted upon, at the time bids on the project were open, when said general contractor has had his license renewed by said Board at the time the contract for the construction of said project is awarded.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 6, 1938, as follows:

Please give me an opinion covering the following question which arises in Talladega County.

"1. The Talladega County Board of Education asked for bids on the contract of a building which bids were received on the _____ day of _____, 1938.

"The firm of Croley, Boynton and Boynton were the low bidders on the project, which was to be financed as a P. W. A. project. This partnership had previously been licensed as general contractors in Alabama and had application pending for a new license at the time the bids were opened, but such application had not been acted upon.

"The Board of Education did not award the contract but postponed action until the 6th day of September, 1938, and during the interim said

partnership of Croley, Boynton and Boynton were duly licensed as general contractors in every respect. If the contract is awarded to the firm it will amount to more than \$1,100.00 saving to the Talladega Board of Education.

"Please advise me if the Board of Education of Talladega County can award this contract to said Croley, Boynton and Boynton, low bidders on same, they having substantially complied with the law requiring a license for general contracting."

It is my information that this contract has not yet been awarded.

In my opinion, the Board of Education of Talladega County has the authority to award the contract in question to the firm mentioned in your letter of inquiry.

If the amount of the project to be constructed is in excess of \$10,000.00, then the general contractor on the project and the awarding authority are subject to the provisions of the act governing general contractors, which is Act No. 297, General Acts, 1935, page 721, approved September 2, 1935, and effective sixty days after its approval. (Section 1 of said Act). I assume that the amount involved is such as would bring them within the terms of said act.

As pointed out by this office in an opinion to Hon. Ed Pettus, Secretary and Treasurer, State Licensing Board for General Contractors, Montgomery, Alabama, under date of August 30, 1938, a general contractor who bids on projects within the State of Alabama should comply with the law governing general contractors and should be licensed by the State Licensing Board for General Contractors before bidding on such projects within the State of Alabama; and an awarding authority, in this case, the Board of Education of Talladega County, is charged by the provisions of said act with issuing plans and specifications or proposed forms to, and considering bids from, only licensed general contractors. However, we also held in said opinion that there was no penalty placed upon such an awarding authority for failure to comply with the provisions of said act, and that the Board would have no recourse whatever against an awarding authority if it issued plans or specifications or proposed forms to, and accepted bids from, a general contractor who had not been licensed by the Board.

The provisions of said act dealing with the duty of awarding authorities are found in the following part of Section 14:

"All architects and engineers preparing plans and specifications for work to be constructed in the State of Alabama, shall include in their invitations to bidders and in their specifications a copy of this act or such portions thereof as are deemed necessary to convey to the invited bidder whether he be a resident or non-resident of this state and whether a license has been issued to him or not, the information, that it will be necessary for him to show evidence of license before the bid is considered
* * * "

and in Section 15 which provides:

"No awarding authority or its agent shall issue to other than a licensed general contractor, or his authorized representative, plans or spec-

ifications or proposed forms, where these are required; and where bids are to be received on the forms furnished by the awarding authority, no proposal forms or plans or specifications shall be issued to anyone except a licensed general contractor or his representative."

Even if it might be held that the general contractor here under consideration has technically violated the provisions of the act governing general contractors, by bidding on a project after his license as a general contractor had expired, and before his application for a renewal thereof had been acted upon by the Board, and that the awarding authority has violated the provisions of the act by issuing plans or specifications or proposed forms to it and receiving bids from it (questions which it is not here necessary for us to decide), it is my opinion that in any event the County Board of Education of Talladega County may now award the contract in the instant case to the firm described in your letter of inquiry. This for the reason that the said general contractor now has a license to engage in the business of general contracting and can, in compliance with the provisions of Section 14, *supra*, show evidence to the County Board of Education of Talladega County that he has a license before his bid is considered by said Board and the contract awarded to him. Between the time the bids on the project were opened and the present date, no action has been taken on the matter of awarding the contract, and you state that in this interim this general contractor has had his license renewed by the Board. Therefore, it is my opinion that the Board of Education of Talladega County, the awarding authority, may now consider the bid of the general contractor mentioned in your letter of inquiry and award the contract to said firm if it so sees fit, without violating the provisions of the act governing general contractors in so doing.

However, as stated in the opinion to Mr. Pettus, *supra*, there is no recourse against an awarding authority, here the Board of Education of Talladega County, if it fails to comply with the provisions of said act.

Cf. Opinion to Hon. Ed Pettus, *supra*, a copy of which is enclosed herewith for your information since the same has not yet appeared in our published reports.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1938.

Hon. Ed Pettus, Secretary-Treasurer,
State Licensing Board of General Contractors,
223-225 Bell Building,
Montgomery, Alabama.

Contractors—

(1) A general contractor who performs work exclusively on Federal property in erecting an "armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building" is not required to qualify with the State Licensing Board for General Contractors.

(2) Whether a general contractor, who performs work exclusively on Federal property for any purpose other than enumerated above, must qualify with said Board depends upon what jurisdiction the State of Alabama has ceded to the Federal Government over the land in question.

Opinion by Assistant Attorney General Crittenden.

Dear Sir:

This is to acknowledge your letter of July 9, 1938, which is as follows:

"I have been requested by the Board through a formal resolution to ask your opinion on the following question.

"Does a private general contractor and by private we mean person, firm or corporation, who performs work for the United States Government on property owned by the United States Government have to comply with Senate Bill 112 passed by the 1935 Legislature known as State Licensing Board for General Contractors or is such person, firm or corporation exempted under Section 13 of the Act or otherwise?"

Section 1 of Act 297, S. 112, Gen. Acts 1935, p. 721, to which you refer, is as follows:

"Section 1. For the purpose of this Act a 'general contractor' is defined to be one who, for a fixed price commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading, or any improvement or structure where the cost of the undertaking is ten thousand dollars or more, and any one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements above mentioned, **in the State of Alabama**, costing ten thousand dollars or more, shall be deemed to have engaged in the business of general contracting in the State of Alabama." (Italics supplied).

To facilitate an answer to your letter, I will divide your inquiry into two parts:

(1) Is a private contractor, who performs work for the U. S. Government on property acquired for one of the purposes enumerated in Section 1505, Code of Alabama, 1923, subject to a state contractor's license?

(2) Is a private contractor, who performs work for the U. S. Government on property acquired other than in accordance with said Section 1505 subject to said license?

In this restatement, the first inquiry should be answered in the negative, if the business is conducted and the work performed entirely on property of the Federal Government because the Federal Government has exclusive jurisdiction over such territory except for the service of process. Therefore, the territory is not "in the State of Alabama" as contemplated in Act 297, *supra*.

Sections 1505 and 1506, Code of Alabama, 1923, provide as follows:

"Section 1505. **CESSION OF CERTAIN LANDS TO UNITED STATES.**—The State of Alabama has ceded to the United States of America jurisdiction over all lands which have been or may hereafter be purchased or otherwise acquired by the said United States in the state of Alabama, for the purpose of erecting thereon any **armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building of any kind whatever**, and the legislature of the State of Alabama has consented to all such purchases or acquisitions by said United States of America." (Emphasis supplied).

"Section 1506. **DURATIONS OF JURISDICTION.**—The jurisdiction ceded shall continue during the term the United States of America shall remain owner of the land so purchased, and shall be exclusive for all purposes except that the service of process issued out of the courts of the State of Alabama, shall not be prevented therein."

These sections were enacted to provide a field of operation in Alabama for Article 1, Section 8, Paragraph 17, Constitution of the United States, which is as follows:

"The Congress shall have power:—To exercise **exclusive legislation** in all cases whatsoever, over such district (not exceeding ten mile square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise **like authority over all places purchased by the consent of the legislature of the state** in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." (Emphasis supplied).

From the above it is apparent that when the Federal Government acquires land in Alabama for one of the purposes enumerated in Section 1505, supra, and Paragraph 17, supra, it acquires, ipso facto, "exclusive legislation" thereover. **Webb v. White Engineering Company**, 204 Ala. 429, 85 So. 729. The service of process is specifically reserved by Sec. 1506, Code of 1923, supra.

In speaking of "exclusive legislation" as used in Article 1, Section 8, Paragraph 17, Mr. Justice Van Devanter stated in *Surplus Trading Co. v. Cook*, 281 U. S. 652; 74 Law Ed. 1095; 50 S. Ct. 455:

"'Exclusive legislation' is consistent only with exclusive jurisdiction. It can have no other meaning as to the seat of government, and what it means as to that it also means as to forts, magazines, arsenals, dockyards, etc. That no divided jurisdiction respecting the seat of government is intended is not only shown by the terms employed but it is a matter of public history."

The only power the State may reserve in giving such consent is the authority to serve process on the property. **Concessions Co. v. Morris, et al.**, 109 Wash. 46, 186 Pac. 655; **Ft. Leavenworth R. R. Co. v. Lowe**, 114 U. S. 525, 29 Law Ed. 264. This reservation of authority is not considered as interfering in any respect with the supremacy of the United States but is admitted to prevent Federal owned property from becoming an asylum for fugitives from justice

Therefore, in my opinion, your first question should be answered in the negative if the business is conducted and the work is performed wholly on the property of the Federal Government.

If the contractor's operations extend in any manner whatever beyond the limits of the Federal property and on to lands over which the State has jurisdiction, the contractor thereby becomes amenable to the jurisdiction of the State. A recent Virginia case involved a foreign corporation erecting a post office. In the course of its work, the corporation occupied to the exclusion of the public, an adjacent street with its machinery and necessary work. The Court held that such occupation constitutes "transacting business in the State so as to be subject to a statute providing for a contract license fee". **Ralph Sollitt & Sons Construction Co. v. Commonwealth of Virginia**, 172 S. E. 290, appeal dismissed by U. S. Sup. St. 78 Law Ed. 1463 (Ad. sheets) 91 A. L. R. 774. The case of **Ohio River Contract Co. v. Gordon**, 244 U. S. 68, 61 L. Ed. 997, 37 S. Ct. 599, involved a similar question. There a foreign corporation was performing work under a contract with the Federal Government on a canal reservation, which is property acquired in accordance with Paragraph 17, *supra*. The contractor built a spur railroad beyond the limits of the reservation to dispose of material excavated. The court held that the construction of the railroad on property subject to the State jurisdiction subjected the contractor to State jurisdiction.

The cession of the Federal Government of jurisdiction over lands acquired for one of the purposes mentioned in Paragraph 17, *supra*, is now governed by Sections 1505 and 1506 rather than Sections 3147 and 3161, Code of Alabama 1923. Sections 1505 and 1506 are a later enactment and supersede the former enactment, because the two are in conflict.—**Middleton v. General Waterworks and Electrical Corp.**, 25 Ala. App. 455, 149 So. 351, Cert. Den. 149 So. 352. For your information, Maxwell Field falls within the purview of the first question.

We come now to the second question which must be answered conditionally. The Federal Government acquires lands for many purposes other than those enumerated in Paragraph 17, *supra*, and when lands are thus acquired the Federal Government does not, *ipso facto*, gain exclusive jurisdiction. It gains only that amount of jurisdiction which is necessary to carry out the purpose for which the land was acquired, free from interference by the State. In **James v. Dravo Contracting Co.**, *supra*, Mr. Chief Justice Hughes stated as follows:

" * * * it is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. The lands remain a part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its rights of disposal. Clause 17 governs those cases where the United States acquires lands with the consent of the legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is consistently with the carrying out of the purpose of the acquisition, determine the extent of the federal jurisdiction." (Emphasis supplied).

It will be seen from the above that an answer to the second question depends upon the purpose for which the property was acquired, and also whether or not the State has ceded any jurisdiction.

When the Federal Government acquires property for any purpose whatsoever, it must do so by direct authority granted it by the Constitution of the United States. This is an inevitable result when the character of the Constitution is considered. In contra-distinction to our State Constitution, which is a curb on the otherwise plenary powers of the Legislature, the Constitution of the United States is a grant of authority only for the purposes enumerated therein. Therefore, when the Federal Government acquires property for any purpose enumerated in the Federal Constitution it thereby acquires jurisdiction to carry out that purpose, free from interference by the State. This point is well illustrated in the recent case of **Silas Mason, Inc. et al. v. Tax Commission of the State of Washington**, 82 Law Ed 154 (ad. Sheets) where the extent of Federal jurisdiction over lands acquired for the construction of the Grand Coulee Dam was under consideration. The history of that case, in brief, is as follows: In 1902 the Federal Government owned large tracts of land which were comparatively worthless without irrigation but which would be highly productive if irrigated. With a view of making these arid lands available for agriculture, the Congress, in that year, passed an Act for "the construction of irrigation works for the reclamation of arid lands". (32 Stat. at I. 388, Chapt. 1093; 43 U. S. C. 391). This was enacted under authority granted by Art. 4, Sec. 3, Par. 2 of the Federal Constitution, which is as follows:

"The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims of the United States, or of any particular state."

The Grand Coulee is one of the dams constructed under authority of this Act as subsequently amended. In the course of said construction it was necessary for the Federal Government to acquire additional lands which it had the authority to do because said acquisition was incidental to the construction of the Dam. The State of Washington had given no consent whatever to the Federal Government to acquire lands for purposes other than those set out in Paragraph 17, supra. Nor had the State ceded any jurisdiction over the lands in question.

It was from a contractor performing work on these lands that the State of Washington attempted to collect an occupation tax. The contractor, Silas Mason, Inc., contending that the State had no jurisdiction over the lands, brought suit to restrain the collection of the tax. In the opinion of the Supreme Court, Mr. Chief Justice Hughes held that the lands in question are subject to the jurisdiction of the State in all matters not in conflict with the purposes for which they were acquired. He further held that, inasmuch as the imposition of the State tax on the contractor is not in interference with those purposes, the contractor is liable for the tax.

We now come to the more specific part of your inquiry, i. e., what class of taxation is provided by Act 297, General Acts 1935, page 721, to which you refer. This Act provides a regulatory measure under the police power rather than a revenue tax. Therefore, unless the Legislature has ceded to the Fed-

eral Government police jurisdiction over the particular land in question, a contractor performing work exclusively thereon must comply with the provisions of Act 297, supra.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1938.

Hon. H. E. Kendrick,
Tax Collector, Dallas County,
Selma, Alabama.

Tax Assessors—

1. Entitled to Assessor's fee provided by Section 54 of the 1935 Revenue Act on escape assessments caused to be made by an agent of the State Tax Commission.

2. Entitled to commissions on collections made on escape assessments caused to be made by an agent of the State Tax Commission.

Opinion by the Attorney General.

Dear Sir:

I have your letter of August 16, 1938, which follows:

"Mr. R. Lewis McAdory, Assistant to the State Tax Commission, has caused to be made numerous escape assessments on foreign securities in this county. These assessments are made in the name of Mr. John S. Pollard, Tax Assessor of Dallas County. In relation to these assessments, please give me as early as possible your opinion on the following questions:

"1. Is Mr. McAdory entitled to an Assessor's fee on these escape assessments, or should the fee be paid to the elected Tax Assessor of the County?

"2. Is the Tax Assessor of this county entitled to, and should I pay to him, commissions on these collections of escape assessments?

"3. In cases where Mr. McAdory makes two assessments against a taxpayer (for example, one assessment for the back years 1933-1937, inclusive, and one assessment for 1938) should there be collected from the taxpayer an assessment fee on each assessment?"

Your questions will be considered in seriatim.

In the beginning, it might be well to state that Section 87 of the 1935 Revenue Act gives to the State Tax Commission the authority to employ such assistants as may be necessary for the performance of the duties which may be required of said Commission and to fix the compensation of such assistants, with the approval of the Governor. I am advised that Mr. R. L. McAdory has been so employed by the State Tax Commission and that his compensation has been fixed by a contract with the State Tax Commission, with the approval of the Governor, and that Mr. McAdory's contract does not call for the payment to him of a fee, commission or allowance out of the moneys collected on escape assessments caused to be made by him, but his compensation is paid by the State of Alabama in accordance with the provisions of Section 87, *supra*.

In answer to your first question, I refer you to Section 54 of the 1935 Revenue Act, which reads in pertinent part as follows:

"The Assessor shall be entitled to a fee for making returns of property which has escaped taxation of fifty cents for each assessment, provided if the escape is for more than one year, all back years shall be made on one assessment blank and the current year's escape on a separate assessment, for which he shall be entitled to an additional fee of fifty cents, such fee to be added to and collected with taxes due."

It is to be noted that the fee here provided for the Tax Assessor is for making return of property which has escaped taxation and not for making a demand on the taxpayer for a list of his property. The duty of making this return is placed on the Tax Assessor by Section 45 of the 1935 Revenue Act, and it matters not that the information leading up to the making of the assessment is furnished by, or the assessment is caused to be made by an agent of the State Tax Commission. The return is nevertheless made by the Tax Assessor. He performs the duty or service for which the fee is provided by Section 54, *supra*, is allowed. Therefore, it is my opinion that said fee should be paid to the Tax Assessor of the county and not to the agent of the State Tax Commission who furnished the information to, or caused the assessment to be made by the Tax Assessor.

Section 22 of the 1935 Revenue Act reads, in pertinent part, as follows:

"The Tax Assessor shall, during the current term of the present incumbent of said office, be paid commissions as now provided by law."

Then follows a schedule of commissions to be paid to the Tax Assessor after the expiration of the current term of the present incumbent of the office of Tax Assessor. Both this schedule and the schedule provided in Act No. 151, General Acts, 1932, page 170, approved October 27, 1932, which said Act amended Section 3040 of the Code of Alabama of 1923, are based on collections made by the Tax Collector. It is my opinion that the collections made by the Tax Collector on escape assessments caused to be made by an agent of the State Tax Commission should be included in the total amount of collections on which the Tax Collector is entitled to the commissions provided by the above quoted provisions of law.

In the case of **Crow v. Board of School Commissions of Mobile County**, 228 Ala. 107, the Supreme Court of Alabama made the following statement:

"The Tax Assessor, however, is not entitled to commissioners on taxes collected on assessments not made by him, but made through the agency of the State Tax Commission, on which commissions are allowed by law to the party who lists and assesses the property."

At first blush, this statement might seem to be opposed to the holding next hereinabove announced. However, a careful consideration of the questions involved shows that there is no conflict between this holding of the Supreme Court and the holding here made. An examination of the record in said case discloses that the taxes collected which occasioned the statement of the Supreme Court above quoted were taxes collected on assessments made by the Deputy Tax Assessor provided for by Section 25-A at page 293 of Act No. 290, General Acts, 1923, page 284, approved September 13, 1923. In that case, the Deputy Tax Assessor had the same power and authority in the making of escape assessments that the Tax Assessor had, and the law providing for his appointment provided the commissions which were allowed to him for making the assessment. In the matter of assessments made by him, the Tax Assessor was not required to perform any duty or render any service and did not perform any duty or render any service. That, no doubt, is the reason for the holding of the Supreme Court that in such a case he was not entitled to commissions on such collections. However, in the instant case the assessment is made by the Tax Assessor just as he makes other escape assessments, and the agent of the State Tax Commission merely furnishes the information to him, or causes the assessment to be made by him. Since the Tax Assessor performs the service of making the assessment, it is my opinion that he is entitled to have the collections made on such assessments included in the collections on which he is paid the commissions provided by law. This holding is supported by the following statement from **Crow v. Board of School Commissioners of Mobile County**, supra:

"When said sections of the Code (Sections 3040, 3048 (the latter section being the section providing for the commissions of Tax Collectors) are interpreted in the light of related sections governing the assessment and collection of taxes, the legislative intent is clear that the commissions are allowed for services rendered, and the commissions are to be computed on the taxes—the money collected."

In answer to your third question, I refer you to the part of Section 54 of the 1935 Revenue Act set out in my answer to your first question. You will see that provision is there made for two assessments in such a case and two fees of fifty cents each.

The 1923 Act, supra, providing for the appointment of a Deputy Tax Assessor was amended by Act No. 259, General Acts, 1931, page 295, approved June 10, 1931, and the amendatory Act was repealed by Section 49 of the 1935 Revenue Act. Therefore, the instant situation is not to be confused with the situation where the assessments were made by a Deputy Tax Assessor, and the opinion to Hon. C. D. Wadsworth, Tax Collector, Autauga County, Prattville, Alabama, dealing with the fees of a Deputy Tax Assessor is not applicable.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

September 30, 1938.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Sheriffs—Entitled to fee provided by Section 7287, Code of Alabama, 1923, not to exceed \$90.00 annually, upon showing to the Court of County Commissioners that he has discharged his duties in relation to the public roads.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of recent date, which reads as follows:

"A Sheriff of a certain County in the State has presented to the Commissioners Court a claim that reads as follows:

"Discharging my duties in relation to the public roads, reporting and condemning bridges in different parts of the County, reporting gullies, washouts, mud holes and keeping order at ball games, box suppers and other school and church entertainments for the year 1937 \$90.00."

"Please refer to your opinion of November 15, 1933, to Hon. W. H. Gillespie, Sheriff of Chilton County, Biennial Report 1932-1934 page 427, and Section 7287 Vol. III, Code of 1923, page 602 and advise me as follows:

"1. Are the services referred to in this claim duties of the Sheriff in relation to public roads? If such services are duties in relation to Public Roads will the claim for \$90.00, upon the approval of the Commissioners Court, be a legal expenditure of county money?"

The part of Section 7287 of the Code of Alabama, 1923, pertinent to your inquiry reads as follows:

"Sheriffs are entitled to receive the following fee for the following services: * * * Discharging his duties in relation to public roads, he is entitled to receive annually, on showing to the court of county commissioners that he has discharged his duties, to be paid out of the county treasury, not exceeding \$90.00."

This provision has been a part of the statutory law of this state, in substantially the same form as it now appears, since December 23, 1836. It first appeared as Section 10 of Act No. 13, General Acts, 1836, page 11, approved December 23, 1836, and provided for the payment to the sheriff, for these services, of the flat sum of \$90 annually, upon his showing to the Court of County Commissioners that he had performed such services. It was carried in this form in Aiken's Supplement of 1841 at page 315, and Clay's Digest, 1843, on page 509, as Section 1186 of the Code of 1852 and Section 1374 of the Code of 1867. In all of these publications of our statutory law it appeared

as part of the article or chapter on public roads, bridges, ferries, etc. By Act No. 71, General Acts, 1876-77, page 93, approved December 2, 1876, the flat sum of \$90.00 was changed to the sum of not exceeding \$90.00. That is the form in which it now appears in the code, and it appeared in this form as Section 5032 of the Code of 1876, Section 3687 of the Code of 1886, Section 1377 of the Code of 1896, and Section 3722 of the Code of 1907. In the last five codes it has appeared as a part of the article or chapter on costs and fees of officers.

It has never been repealed since it was first enacted in 1836, and the only change, which is noted above, was made in 1876.

It is true that Section 7255 of the Code of Alabama, 1923, provides:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

However, Section 7276 of Article 7 of Chapter 275 of the Code of Alabama, 1923, which is the chapter on costs and fees of officers, also provides:

"Clerks, sheriffs, and other officers in this chapter named are entitled to receive, for the services therein mentioned, the fees to such services respectively annexed; and no more, to be taxed, paid, and collected in the manner directed by the provisions of this code."

Section 7287, *supra*, is a part of the same article and chapter.

Speaking to the general question of the authority of an administrative board or agency, the creature of legislation, to expend public funds, Mr. Justice Brandeis, for the Supreme Court in the case of **Woodruff v. Beeland**, 127 So. 135, said:

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred."

The administrative board dealt with in that case was a county board of education.

We believe that the converse of his statement is equally true and that when an administrative board or other agency, the creature of legislation, (here a Court of County Commissioners) can point to a "thus saith the law", for a disbursement, that it has the authority to make such disbursement, and that when a given charge on a fund is expressly or impliedly authorized, it can be lawfully incurred.

County governing bodies have the general superintendence of the public roads, bridges and ferries within their respective counties, and to that end have legislative, judicial and executive power, having unlimited jurisdiction and powers in such matters, except as their jurisdiction and powers may be

limited by local or special statutes. This has been so since the passage of an Act of the Legislature of 1915 on September 22, 1915, appearing on page 573 of the General Acts of 1915. Section 1 of said Act, giving such powers to county governing bodies, appears as Section 1347 of the Code of Alabama, 1923, and was re-enacted without substantial change in the 1927 Highway Code and appears as Section 1397 (110) of Michie's Code of Alabama, 1928. Therefore, a county governing body, pursuant to this authority, may order the sheriff of the county to perform certain duties in regard to public roads and bridges. And the sheriff must obey such orders, for Section 10189 of the Code of 1923 reads in pertinent part:

"It is the duty of the sheriff * * * (2) To attend upon * * * the Court of County Commissioners, when required by the judge of probate, and to obey the lawful orders and directions of such courts."

If a county governing body orders the sheriff to perform certain duties in relation to the public roads, and Section 1397 (110), supra, gives it authority to do so, and he shows to their satisfaction that he has performed these duties, which he must perform (Section 10189, supra), it is my opinion that the above quoted provisions of Section 7287 of the Code of Alabama of 1923 are authority for the county governing body to pay the sheriff from county funds an amount for this service or these services not exceeding \$90.00. The amount that he shall be paid, up to the \$90.00 limit, and the question of whether or not he has performed his duties in relation to the public roads are questions that address themselves to the discretion of the county governing body.

The premises considered, it is my opinion that in the instant case, if the county governing body has placed upon the sheriff the duty of reporting and condemning bridges in different parts of the county, reporting gullies, wash-outs and mudholes, and is satisfied that he has performed these duties, and that he should be paid \$90.00 for these services, then such an expenditure of county funds is authorized by the above quoted provisions of Section 7287 of the code of Alabama of 1923. Of course, any duty that the sheriff might have performed in relation to keeping order at ball games, box suppers and other school and church entertainments are not, and could not possibly be, duties in relation to the public roads. These are duties required of him as a conservator of the peace of the county.

The opinion of this office to Hon. W. H. Gillespie, Sheriff of Chilton County, under date of November 15, 1933, Biennial Report of Attorney General, 1932-1934, page 427, is hereby modified to conform to the holding of this opinion. The very fact that the provisions of our statutory law providing a fee to the sheriff for the performance of his duties in relation to public roads, upon his showing to the Commissioners Court that he has performed such duties, has not been repealed militates against the statement made in said opinion that the sheriff no longer has any duties in connection with the public roads.

Your very truly,

A. A. CARMICHAEL,
Attorney General.

SOLICITOR'S REPORTS

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Abandonment	6	2			4			1		1
Abduction	1			1						
Abortion	2			2						
Abusive Language	242	95	22	115	10			44	3	48
Adultery	55	16	8	27	4			9		7
Affray	24	8		16				2	2	4
Aiding prisoner to escape	11	8		3			7	1		
Arson	86	47	11	23	5	3	44			
Assault	36	16		1	3			6		10
Assault and battery	918	582	60	246	30		3	194	40	345
Assault to murder	765	361	88	276	40	1	298	33	3	26
Assault to rape	18	14	1	1	2		13	1		
Assault to ravish	30	14	6	8	2		10	4		
Assault to rob	35	27	1	6	1		24	1		2
Assault with weapon	261	184	12	53	12		3	90	19	72
Attempt to burglarize	13	13					1	4		8
Attempt to commit arson	5	4	1				1		3	
Attempt to commit felony	21	8	3	10				4		4
Attempt to commit forgery	1	1								1
Attempt to commit larceny	3	2		1				1		1
Attempt to distill	215	211	2	2			1	9		201
Attempt to murder	11	5		6			5			
Attempt to rob	4	2		1	1		2			
Attempt to transport liquor	5	5						1		4

Bad check	114	34	3	47	30		1	25	1	7
Bastardy	144	45	15	64	20		2	14		29
Bestiality				1						
Betting at gaming table	3	3								3
Bigamy	26	13		12	1		13			
Blackmail							1	2		
Borrowing funds of bank by officer	1	1								
Breach of the peace	3	1		1			1			1
Burglary	1243	944	66	175	58		912	25		7
Burglary and grand larceny	314	218	20	70	6		189	23	1	5
Burning hay	1				1					
Burning woods	3	1		1	1					1
Buying stolen property	2	2						1		1
Carnal knowledge	78	26	21	28	3		24	2		
Carrier of persons for hire	2			2						
Carrying concealed weapon	190	100	12	61	17		1	50	6	43
Carrying pistol without license	9	3	1	4	1					3
Compounding a felony	1	1								1
Concealing stolen property	66	29	3	34			15	10	2	2
Conducting a lottery	1	1						1		
Conspiracy	3	1		2						1
Contempt of court	4	2		1	1				1	1
Contributing to delinquency of child	14	5	1	8				3		2
Crime against nature	5	2		3			2			
Cruelty to animal	1	1								1
Cutting timber	2	1	1							1
Lecoying child	5			5						
Defacing building	13	7		5	1			4	1	2
Defamation	4	2		2				1		1
Defaulting witness	3			3						
Defective car	14	6	1	5	2			1	1	4
Desertion	6	1		3	1					1
Destroying lien	1									
Displaying nude pictures	1	1	1							1
Disposing mortgaged property	21	5	2	14			2	2		1

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequites	Abated or Withdrawn	Number of Sentences to			
						Death	Penitentiary	Hard Labor	Jail
Disposing property covered by lien	4			4					
Distilling	945	676	55	197	17		646	1	29
Disturbing assembly	4	3		1					3
Disturbing peace	1	1			1				
Disturbing school	1	1						1	
Disturbing woman	4	3	1					1	2
Disturbing worship	35	16	4	12	3			6	9
Driving overloaded truck	3			1	2				
Driving while intoxicated	329	179	45	80	25		4	53	99
Driving with improper tag	1	1							1
Driving without license	9	3		5	1			1	1
Embezzlement	101	45	9	41	6		25	16	3
Escape	26	13		13				7	6
Failure to keep butcher's record	1	1					1		
Failure to keep proper reports	12	1		1	11				1
Failure to send child to school	1	1							
Failure to work road	4			4					
False pretense	200	63	12	116	9		26	16	14
Forfeiture	19	18			1				18
Forgery	399	256	13	103	27		180	66	5
Fraud	1								
Gambling	14	4	1	9				4	
Gaming	44	19	2	12	11			3	16
Grand larceny	2005	1431	131	379	64		1286	138	3

[illegible]

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Possession of counterfeit stamps	2	2					2			
Possession of still	37	23	1	9	4		22	1		
Practicing embalming without license	1	1								1
Practicing medicine without license	11	6	1	3	1			1		5
Practicing optometry without license	1			1						
Presenting firearms	48	21	5	21	1		2	4		15
Profane language	3									
Public drunkenness	354	212	30	102	10			61	9	142
Punch boards	15	10		5						10
Rape	73	20	21	28	4	1	18			1
Receiving stolen property	75	40	3	22	10		23	4		13
Reckless driving	249	135	24	77	13			30	5	100
Refusing to pay street tax	4	1		2	1					1
Removing boundary marks	3	1	1	1						1
Removing fixtures from bldg.	1	1								1
Removing mortgaged property	4	4					4			
Removing property covered by lien	10	3	1	5	1		2			1
Resisting arrest	5	1		4				1		
Resisting officer	13	7		4	2			7		
Robbery	321	206	38	65	12		203	2		1
Seduction	30	5	3	22			5			
Seining	3	3						2		1
Selling diseased horse	1			1						
Selling insurance without license	3	1	1	1				1		

Selling mortgaged property	36	9	1	26				2	5		2
Selling supplies to county	3	2		1							2
Selling unregistered securities	2	2						2			
Sending threatening letter	1	1									1
Setting off dynamite	7			7							
Shooting across highway	2			2							
Shooting into dwelling	14	7	3	2	2				1		6
Signing false certificate of election	10			10							
Slander	1			1							
Sodomy	3	3							1		
Soliciting insurance illegally	1			1					2		
Speeding	29	16	2	9	2				6		10
Temporary use of auto	9	7		2					4		3
Temporary use of property	2	2							1		1
Threats	4	3		1							3
Throwing into dwelling	3	2	1								2
Throwing missile into train	1	1									1
Transporting	24	14	2	7	1			8			6
Transporting liquor	59	33	8	11	7			26			7
Trapping without license	1			1							
Trespass	86	19	12	43	12				7		12
Unlawful assembly	5			5							
Unlawful riding train	6	6							6		
Using car without owner's consent	14	12		2					9	2	1
Using property without owner's consent	2	2							2		
Vagrancy	228	86	20	115	7				35	22	29
Violating auto law	3		2	1							
Violating barber law	16	3		11	2						
Violating carrier act	17	5		11	1				1	3	4
Violating check law	3		1	1	1						
Violating city ordinance	2			2							
Violating cosmetology act	70	1		69							1
Violating election law	17	1	2	14							1
Violating fish law	16	2		12	2					1	1
Violating game law	51	6	21	23	1						6

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to			
						Death	Penitentiary	Hard Labor	Jail
Violating gasoline law	3			1	2			6	9
Violating highway law	55	25	4	25	1				10
Violating hog law	2			1	1				
Violating insurance law	1	1							1
Violating license law	26	5	3	17	1			2	3
Violating lottery law	37	18	6	13			5	16	2
Violating narcotic law	7	5		2					
Violating oyster law	3	1		2					
Violating pharmacy law	1	1		1					1
Violating pistol law	4	2		2					
Violating plumbing law	1			1					1
Violating prohibition law	2310	896	207	1097	110		23	311	25
Violating pure food law	1			1					
Violating rabies law	4			4					
Violating railroad law	4	4							4
Violating rented motor vehicle law	1	1							
Violating revenue law	43	5	5	33				1	4
Violating sanitary law	1			1					
Violating Section 3186 of code	1				1				
Violating Section 3339 of code	1	1							1
Violating Section 3448 of code	2	2							2
Violating Section 4908 of code	1			1					
Violating Section 4925 of code	2			2					
Violating state oil and grease law	1			1					

Violating stock law	22	2	20							2
Violating Sunday law	45	5	18	21	1			3		2
TOTALS	16082	9229	1315	4829	709	24	4691	1753	306	2455

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Or Secured Fines Paid	
						Death	Penitentiary	Hard Labor	Jail		
FIRST CIRCUIT											
Choctaw County	78	35	12	26	5		15	1		19	
Clarke County	92	47	9	32	4		19	1		27	
Washington County	119	37	19	50	13		16	1	3	17	
TOTALS	289	119	40	108	22		50	3	3	63	
SECOND CIRCUIT											
Butler County	116	81	6	28	1		44	14		23	
Crenshaw County	95	49	12	32	2		23	9		17	
Lowndes County	78	54	8	14	2		44	6		4	
TOTALS	289	184	26	74	5		111	29		44	

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

THIRD CIRCUIT											
Barbour County	179	126	23	29	1	39	17	70			
Bullock County	120	90	13	17		58	8	24			
Dale County	104	74	10	19	1	34	3	35	2		
Russell County	351	228	40	83		125	23	77			
TOTALS	754	518	86	148	2	256	51	2	216		
FOURTH CIRCUIT											
Bibb County	113	59	2	40	12	37	17	5			
Dallas County	350	217	14	82	37	118	50	43	6		
Hale County	150	110	4	30	6	61	30	14	5		
Perry County	181	72	11	74	24	33		39			
Wilcox County	137	80	3	45	9	68	7	3	2		
TOTALS	931	538	34	271	88	317	104	13	104		

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

SEVENTH CIRCUIT									
Calhoun County	233	138	41	50	4	—	66	35	37
Cleburne County	40	32	1	6	1	—	22	7	3
Talladega County	91	67	8	15	1	—	44	11	12
TOTALS	364	237	50	71	6	—	132	53	52
EIGHTH CIRCUIT									
Cullman County	126	51	12	44	19	—	27	3	21
Lawrence County	35	23	3	9	—	—	23	—	—
Limestone County	217	113	17	70	17	—	66	13	32
Morgan County	205	115	19	64	7	2	102	3	8
TOTALS	583	302	51	187	43	2	218	19	61
NINTH CIRCUIT									
Cherokee County	121	49	10	61	1	—	16	11	19
DeKalb County	151	37	12	98	4	—	32	1	4
Jackson County	179	48	8	114	9	—	19	8	17
Marshall County	254	60	10	183	1	—	14	5	40
TOTALS	705	194	40	456	15	—	81	25	80

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured	
						Death	Penitentiary	Hard Labor	Jail		
TENTH CIRCUIT											
Jefferson County	2821	1602	223	977	19	1	972	487	11	131	
TOTALS	2821	1602	223	977	19	1	972	487	11	131	
ELEVENTH CIRCUIT											
Colbert County	296	197	20	77	2		81	28	2	86	
Franklin County	80	54	5	14	7		29	7		18	
Lauderdale County	120	106	12	2		3	88	8		7	
TOTALS	496	357	37	93	9	3	198	43	2	111	

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured	
						Death	Penitentiary	Hard Labor	Jail		
FIFTEENTH CIRCUIT											
Montgomery County	721	543	48	127	3	2	463	52		26	
TOTALS	721	543	48	127	3	2	463	52		26	
SIXTEENTH CIRCUIT											
Blount County	132	65	11	54	2	1	15	15	5	29	
Etowah County	571	302	55	179	35	2	89	34	6	171	
St. Clair County	86	40	18	23	5		19			21	
TOTALS	789	407	84	256	42	3	123	49	11	221	

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

SEVENTEENTH CIRCUIT											
Greene County	270	223	12	35					52	35	136
Marengo County	212	162	16	34				1	75	4	82
Pickens County	71	50	8	13					8	4	38
Sumter County	127	82	19	24			2	1	52	2	27
TOTALS	680	517	55	106	2	2			187	45	283
EIGHTEENTH CIRCUIT											
Clay County	54	36	7	11					20	8	8
Coosa County	36	26	5	5					17	8	1
Shelby County	253	204	14	31		4			132	12	59
TOTALS	343	266	26	47	4				169	28	68

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured	
						Death	Penitentiary	Hard Labor	Jail		
NINETEENTH CIRCUIT											
Autauga County	153	97	7	45	4		59	18		20	
Chilton County	387	214	5	156	12		35	60		119	
Elmore County	246	157	13	72	4	1	98	24		34	
TOTALS	786	468	25	273	20	1	192	102		173	
TWENTIETH CIRCUIT											
Henry County	63	44	8	10	1		15	13		16	
Houston County	216	150	23	43			75	36		39	
TOTALS	279	194	31	53	1		90	49		55	

GENERAL SUMMARY OF CASES IN CIRCUITS, 1936-1938—(Continued)

TWENTY-FIRST CIRCUIT												
Baldwin County	137	80	2	43	12				38	11	6	25
Conecuh County	103	62	7	26	8				47	9	2	4
Escambia County	116	59	10	33	14				29	11	2	17
Monroe County	136	84	6	38	8				34	29		21
TOTALS	492	285	25	140	42				148	60	10	67
TWENTY-SECOND CIRCUIT												
Geneva County	90	53	2	33	2	2			37	11		3
Covington County	212	127	14	66	5				34	61		32
TOTALS	302	180	16	99	7	2			71	72		35
TWENTY-THIRD CIRCUIT												
Madison County	868	334	120	337	77	1			76	108	7	142
TOTALS	868	334	120	337	77	1			76	108	7	142

CIRCUIT COURT OF AUTAUGA COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Abusive language	4	3		1						3
Arson	1	1					1			
Battery	1	1								3
Assault and battery	4	3	1							3
Assault to murder	30	21		9			18	2		1
Bastardy	1	1								1
Burglary and grand larceny	34	25	2	5	2		16	4		5
Carnal knowledge	3	3					3			
Carrying concealed weapon	1			1						
Distilling	7	2	1	4			2			
Forgery	1	1					1			
Grand larceny	28	17	1	10			14	2		1
Injury to property	2	2								2
Leaving scene of accident	1	1						1		
Manslaughter	3	3						3		
Murder	6	4	1	1			4			
Non-support	1	1								
Petit larceny	1	1						1		
Practicing medicines without license	6	4		2	1			3		1
Presenting firearms	1									
Public Drunkenness	1	1		1						
Reckless driving	2	2								2
Selling mortgaged property	2	1						1		
Trespass	5			5						
	1	1		1						

Violating prohibition law	7	2	1	3	1		1		1		1
Violating stock law	1			1							
TOTALS	153	97	7	45	4		59	18		20	

CIRCUIT COURT OF BALDWIN COUNTY

Abusive language	2	1		1							1
Arson	2	1			1				1		
Assault and battery	10	5		5						2	2
Assault to murder	6	4		1				4		1	
Assault with weapon	6	3		1	2				1		2
Burglary	4	2		1	1			2			
Carrying concealed weapon	1	1		1							
Driving while intoxicated	2			2							1
False pretense	2	2							1		
Forgery	4	3		1				2	1		
Grand larceny	16	16						16			
Incest	1	1									
Injury to animal	4	1		1							1
Injury to property	3	3		2							
Manslaughter	3	2			1				1	1	
Murder	7	6			1				6		
Perjury	4	3						3			
Petit larceny	12	12		1						3	7
Possession of still	2	1							1		
Public drunkenness	4	4								2	2
Reckless driving	2	1									1
Removing property covered by lien	1	1									1
Resisting officer	2			1							

CIRCUIT COURT OF BALDWIN COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Robbery	2	1			1		1			
Temporary use of auto	1	1		1						
Transporting liquor	1	1					1			
Trespass	2	1		1						1
Vagrancy	1	1							1	
Violating game law	6		1	5						
Violating license law	3			3						
Violating prohibition law	21	8		11	2			2		6
TOTALS	137	80	2	43	12		38	11	6	25

CIRCUIT COURT OF BARBOUR COUNTY

Abusive language	4	1	1	2						1
Adultery	3	1		2				1		
Affray	4	4								4
Arson	1	1					1			
Assault and battery	17	13	1	3				1		12
Assault to murder	4	1	2	1			1			

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CIRCUIT COURT OF BIBB COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Abusive language	7	5		2						
Adultery	2		1	1				5		
Assault and battery	5	1		4				1		
Assault to murder	17	11		5	1		11			
Assault with weapon	1	1						1		
Bastardy	1				1					
Burglary	11	6		2	3		6			
Carrying concealed weapon	1	1						1		
Defacing building	6	4		1	1			4		
Distilling	14	10		2	2		10			
Driving without license	1			1						
False pretense	1			1						
Forgery	2	1			1		1			
Grand larceny	15	6		6	3		4	1		1
Manslaughter	1			1						
Murder	3	2		1			2			
Petit larceny	2	2						2		
Possession of still	5			5						
Presenting firearms	1	1						1		
Public drunkenness	1	1								1
Rape	1									
Reckless driving	4	3		1						3
Resisting officer	1	1		1				1		

CIRCUIT COURT OF BLOUNT COUNTY

CIRCUIT COURT OF BLOUNT COUNTY—(Continued)

CHARACTER OF OFFENSE	N ^o . of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Petit larceny	13	7	1	5				3	4	
Public drunkenness	4	1		3						1
Rape	1	1					1			
Reckless driving	1	1								1
Resisting officer	1	1						1		
Seduction	1			1						
Vagrancy	2	1		1						1
Violating prohibition law	17	7	2	6	2			1		6
TOTALS	132	65	11	54	2	1	15	15	5	29

CIRCUIT COURT OF BULLOCK COUNTY

Arson	1	1	1				1			
Assault and battery	10	8	1	1				1		7
Assault to murder	5	3	1	1			3			
Bastardy	2	2								2
Bigamy	2	2					2			
Burglary	9	9					9			

	2	1	1	1	1	1	1	1	8	58	24
Concealing stolen property	2	1									
Embezzlement	1	1							1		
False pretense	1	1							1		
Grand larceny	42	30	6	6					30		
Hunting without license	1		1								
Incest	1		1								
Manslaughter	2	2							2		
Murder	5	5							5		
Perjury	1										
Petit larceny	5	2	1						2		
Practicing medicine without license	3	2	1								
Reckless driving	1		1								
Robbery	4	4							4		
Seduction	1		1								
Seining	3	3							2		
Trespass	2	1	1						1		
Using car without owner's consent	1	1									
Vagrancy	1		1								
Violating prohibition law	14	12	2						1		
TOTALS	120	90	13	17					8	58	24

CIRCUIT COURT OF BUTLER COUNTY

[illegible]

CIRCUIT COURT OF BUTLER COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Embezzlement	2	2					2			2
Forfeiture	2	2								
Forgery	5	5					5			6
Gaming	6	6								
Grand larceny	10	7		3			7			
Injury to animal	2	2								2
Manslaughter	6	5		1			5			
Murder	8	4	1	2	1		4			
Petit larceny	7	5		2				3		2
Presenting firearms	1	1								1
Reckless driving	3	3						1		2
Temporary use of animals	3	3						1		2
Temporary use of auto	2	2						1		1
Transporting	1		1							
Trespass	1		1							
Violating prohibition law	16	3		13				1		2
TOTALS	116	81	6	28	1		44	14		23

CIRCUIT COURT OF CALHOUN COUNTY

Abusive language	3	1	1	1	1	1	1
Adultery	1						1
Arson	1		1				
Assault and battery	2	1	1				1
Assault to murder	5	2	2	1			
Assault with weapon	10	8	2				
Assault to rob	2	2					7
Bastardy	3						
Bigamy	1		1	2			
Burglary	5	5		1			
Buying stolen property	1	1					1
Carnal knowledge	2			2			
Carrying concealed weapon	1		1				
Concealing stolen property	1						
Crime against nature	1	1					1
Distilling	14	11	2	1			1
Driving while intoxicated	12	8	1	3			11
Embezzlement	6	2	1	3			8
Forgery	8	3		1			2
Grand larceny	41	29	4	8			3
Manslaughter	6	3		3			29
Murder	13	5	7	1			3
Operating gambling device	38	29	1	7	1		5
Operating gaming table	1	1					
Petit larceny	1		1				
Rape	4	1	1	2			1
Receiving stolen property	1		1				
Reckless driving	1	1					1
Robbery	7	4	3				4
Transporting liquor	1			1			
Trespass	1	1					1
Vagrancy	1			1			

CIRCUIT COURT OF CALHOUN COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequites	Abated or Withdrawn	Number of Sentences to			
						Death	Penitentiary	Hard Labor	Jail
Violating game law	1	1	1	1	2			13	
Violating prohibition law	37	18	9	8					5
TOTALS	233	138	41	50	4		60	35	37

CIRCUIT COURT OF CHAMBERS COUNTY

Abusive language	2				2							
Arson	1	1					1					1
Assault and battery	2	1			1							
Assault to murder	3	1			2		1					
Assault to rape	1	1					1					
Assault to ravish	1	1						1				
Bastardy	1				1							
Burglary	23	22					22					
Burglary and grand larceny	6	4	1		1		4					
Carnal knowledge	3	2	1				2					
Distilling	4	1			2		1					
Driving while intoxicated	2	1			1			1				

CIRCUIT COURT OF CHEROKEE COUNTY

Abusive language	5	1	1	3				1	1
Affray	2			2					
Aiding prisoner to escape	1	1					1		
Arson	2			2					
Assault	5	2		3					2
Assault and battery	3	1	1	1					1
Assault to murder	2	1		1			1		

CIRCUIT COURT OF CHEROKEE COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Assault with weapon	7	5		2				3	1	1
Bastardy	7									
Burglary	5	3		2			3			
Carnal knowledge	1			1						
Distilling	6	2		4			2			2
Disturbing worship	3	2	1							
False pretense	1		1							
Forgery	6	2								
Grand Larceny	7	4	1	4			1		1	
Hunting without license	1			1			4			
Leaving scene of accident	1			1						
Manslaughter	2	1		1			1			
Miscegenation	1			1						
Murder	3	1	1	1			1			
Non-support	2		1	1						
Petit larceny	8	6		2				3		3
Public drunkenness	7	4	1	2						4
Robbery	1	1					1			
Seduction	1			1						
Selling mortgaged property	2			2						
Selling supplies to county	3	2		1						2
Transporting liquor	3	1		1	1		1			
Trespass	3	1		2						1
Vagrancy	1			1						

Violating prohibition law	18	8	2	8				5		3
Violating Sunday law	1			1						
TOTALS	121	49	10	61	1		16	11	3	19

CIRCUIT COURT OF CHILTON COUNTY

Abusive language	28	12	1	13	2			6		6
Arson	1			1						
Assault and battery	36	10	1	25				3		7
Assault to murder	11	8		2	1		6			2
Assault to ravish	1	1					1			
Bad check	11			10	1					
Bastardy	1			1						
Bigamy	1			1						
Burglary	2	2					2			
Burglary and grand larceny	7	4	1				4			
Carrying concealed weapon	11	9		2				5		4
Decoying child	1			1						
Distilling	15	11		4			7			4
Driving while intoxicated	27	23		3	1			3		20
Gambling	8	2	1	5				2		
Grand larceny	8	6		2			6			
Injury to animal	1	1								1
Injury to building	1			1						
Manslaughter	2	1		1			1			
Murder	5	5					5			
Operating gambling device	2	1		1						1
Petit larceny	2			6						3
Practicing medicine without license	18	12						9		
	1			1						

CIRCUIT COURT OF CHILTON COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to			
						Death	Penitentiary	Hard Labor	Jail
Presenting firearms	1				1				
Public drunkenness	23	19			3			7	
Rape	1				1				12
Reckless driving	8	6						2	
Resisting arrest	3	1			2			1	4
Robbery	7	4			3		1	2	
Sodomy	1	1					1		1
Temporary use of property	1	1							1
Transporting liquor	4	3			1		1		2
Trespass	4	1			3				1
Violating carrier act	2	1			1				1
Violating prohibition law	125	69	1		51			20	49
Violating Sunday law	8				8				
TOTALS	387	214	5	156	12		35	60	119

CIRCUIT COURT OF CHOCTAW COUNTY

Abusive language	2			2					
Arson	1	1					1		

	7	5	2	1	15	1	19
Assault and battery	7	5	2				
Assault to murder	1	1			1		
Assault with weapon	2	2					
Attempt to distill	6	6					
Bad check	1		1				
Burglary	4		2	1			
Carnal knowledge	2		1				
Carrying concealed weapon	1		1				
Disposing mortg. prop.	1		1				
Distilling	2	2			2		
Grand larceny	10	4	2	4	4		
Injury to animal	2		2				
Manslaughter	5	5			5		
Murder	3	2	1		2		
Perjury	1						
Petit larceny	7	4	1	3		1	
Rape	1			1			
Robbery	3		1	2			
Shooting into dwelling	1			1			
Temporary use of auto	1	1					
Trespass	6	2		4			
Violating check law	1			1			
Violating game law	1			1			
Violating prohibition law	5		3	2			
Violating revenue law	1			1			
TOTALS	78	35	12	26	5	15	1

CIRCUIT COURT OF CLARKE COUNTY

[illegible]

CIRCUIT COURT OF CLARKE COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Attempt to distill	2	2								2
Attempt to murder	2	1		1			1			
Burglary	4	2		2			2			
Carnal knowledge	1			1						
False pretense	2			2						
Forgery	1			1						
Gaming	1	1								1
Grand larceny	14	10	1	2	1		10			
Injury to animal	1			1						
Manslaughter	2	2					2			
Murder	5	3	1	1			3			2
Petit larceny	4	2	1	1						
Presenting firearms	1	1								1
Public drunkenness	1	1								
Rape	2	1		1			1			
Selling mortgaged property	2			2						2
Shooting into dwelling	2	2								1
Throwing missile into train	1	1								
Trespass	2		1	1						
Violating auto law	3									
Violating game law	4		2	3	1					
Violating highway law	1	1		1						

	17	5	2	8	2	1
Violating prohibition law	4	4				
Violating railroad law						
TOTALS	92	47	9	32	4	19
						1
						27

CIRCUIT COURT OF CLAY COUNTY

Adultery	2	2								1	
Affray	1	1								1	
Assault to murder	7	4			3				4		
Assault with weapon	3	3								2	
Attempt to distill	3	3									
Bigamy	1	1									
Burglary	8	4			4					1	
Carnal knowledge	1	1								4	
Distilling	8	3			4					1	
Escape	3	3									
Forgery	1	1								3	
Grand larceny	4	3			1					1	
Manslaughter	1	1								3	
Murder	2	1			1						
Non - Support	1									1	
Operating mill without license	1	1			1						
Robbery	2	2							2		
Vagrancy	1	1			1						
Violating prohibition law	4	4								1	
TOTALS	54	36	7	11					20	8	8

CIRCUIT COURT OF CLEBURNE COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Adultery	2	2						2		1
Assault and battery	1	1								
Assault to murder	1	1					1			
Assault with weapon	2	2						1		1
Distilling	19	15			3		15			
Forgery	3	1			2					
Grand larceny	1	1					1			
Manslaughter	1	1					1			
Murder	3	2		1			2			
Perjury	2	1	1				1			
Resisting officer	2	2						2		
Violating prohibition law	3	3						2		1
TOTALS	40	32	1	6	1		22	7		30

CIRCUIT COURT OF COFFEE COUNTY

Abusive language	12	6	1	5				5		1
Arson	5	2	2	1			2			

[illegible]

CIRCUIT COURT OF COFFEE COUNTY — (Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Violating prohibition law	52	41	5	5	1			32		9
Violating revenue law	1			1						
TOTALS	205	122	38	39	6		33	61	1	27

CIRCUIT COURT OF COLBERT COUNTY

Abusive language	2	1									
Adultery	3	1						1			1
Arson	2			2							
Assault and battery	9	7	1	1				3			4
Assault to murder	14	9	1	4			7		1		1
Assault to ravish	1			1							
Assault to rob	1	1					1				
Assault with weapon	18	15	1	2			1	7			7
Attempt to burglarize	1	1						1			
Attempt to commit arson	2	1	1								1
Bestardy	3										
Burglary	18	15		3			14				1

[illegible]

[illegible]

CIRCUIT COURT OF COOSA COUNTY

Abusive language	1	1					1
Arson	2	1		1			1
Assault and battery	1	1					
Assault to murder	2	1		1			1
Assault with weapon	1	1					1
Burglary	8	7	1				7
False pretense	2		1				
Forgery	1	1					1
Grand larceny	4	2	1				2
Hoboing	3	3					
Manslaughter	3	3					3
Murder	2	2					2
Petit larceny	3	3					2
							1

CIRCUIT COURT OF COOSA COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Trespass	1		1							
Violating prohibition law	2		1	1						
TOTALS	36	26	5	5			17	8		1

CIRCUIT COURT OF COVINGTON COUNTY

Abusive language	9	5		4				4		1
Adultery	3	1		2				1		
Arson	2	1	1				1			
Assault and battery	28	18		10				9		9
Assault to murder	15	6	4	5			6			
Assault to rob	2	2					2			
Bad check	17	7	2	8				6		1
Bigamy	2	2					2			
Burglary	4	4					4			
Carnal knowledge	1									
Carrying concealed weapon	7	3	1	1				3		
Conspiracy	1	1								1

[illegible]

CIRCUIT COURT OF CRENSHAW COUNTY

Abusive language	3	3					
Assault and battery	12	9	2				6
Assault to murder	5	3	1			3	
Burglary	4	2	2			2	

CIRCUIT COURT OF CRENSHAW COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Carrying concealed weapon	3	2								2
Distilling	1				1					
Driving while intoxicated	1	1			1					1
Forgery	1		1							
Grand larceny	8	6	1				6			
Injury to animal	1			1						
Manslaughter	3	1	1	1			3			
Murder	10	7	2	1			7			
Non - Support	2	1		1						1
Petit larceny	10	8		2				4		4
Public drunkenness	3	1	1	1						1
Reckless driving	2	1					2			
Robbery	2	2								
Selling mortg. property	1	1						1		1
Shooting into dwelling	2	1	1							
Slander	1				1					
Trespass	3		1		2					
Violating prohibition law	13	2		11				1		1
Violating Sunday law	2			2						
TOTALS	95	49	12	32	2		23	9		17

CIRCUIT COURT OF CULLMAN COUNTY

Abusive language	3			1	2		1		
Arson	1	1					1		
Assault and battery	4	1	1	1	1				1
Assault to murder	5	2	1	1	1				2
Assault to ravish	2		1	1					
Assault to rob	1	1					1		
Bastardy	6	3			3			1	2
Bigamy	1	1					1		
Burglary	4	2					2		
Concealing stolen property	1								
Distilling	3	1	2						1
Disturbing assembly	1	1							1
Disturbing worship	3	2						1	1
Driving while intoxicated	4	2	1	1	1				2
Driving without license	1								
False pretense	15	3			12			3	
Forgery	1	1						1	
Grand larceny	4	2			2			2	
Larceny	1		1						
Manslaughter	6	6					6		
Miscegenation	1	1					1		
Murder	4	3			1		3		
Petit larceny	10	4		5	1		2		2
Public drunkenness	9	7		1	1			1	6
Reckless driving	2				2				
Refusing to pay street tax	4	1		2	1				1
Robbery	1	1					1		
Selling mortgaged property	1			1					
Selling unregistered securities	2	2					2		
Transporting liquor	1	1					1		
Trespass	5								
Vagrancy	5		4	1	1				

CIRCUIT COURT OF CULLMAN COUNTY--(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Violating fish law	4			4						
Violating prohibition law	10	2	1	4	3					2
TOTALS	126	51	12	44	19		27	3		21

CIRCUIT COURT OF DALE COUNTY

Assault and battery	18	15	2	1				1		14
Assault to murder	3	3					3			
Bad check	1		1							
Bastardy	4	4								4
Burglary	6	6					6			
Catching undersized fish	3		2							
Concealing stolen property	3	2		1			1			1
Cutting timber	2	1		1						1
Disposing mortgaged property	1			1						
Distilling	1	1					1			
False pretense	5	1								1
Forgery	1	1		4			1			

[illegible]

CIRCUIT COURT OF DALLAS COUNTY

Abusive language	2	1	1				1
Arson	3	2	1				
Assault and battery	6	5		1			
Assault to murder	25	5	3	14		2	3
Assault to ravish	2	2				5	
Assault with weapon	27	21		6		2	
Bad check	21	3					4
Bastardy	1			18		15	2
Burglary	63	53	1	6		3	
						53	

CIRCUIT COURT OF DALLAS COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequites	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Carrier of persons for hire	2			2						
Carrying concealed weapon	17	7		10				6		1
Distilling	10	4		6			4			
Disturbing public worship	1	1						1		
Driving car without license	1	1							1	
Defective car	3	2			1			1	1	
Driving overloaded truck	3			1	2					
Driving truck over 30 miles an hour	1	1		1						
Embezzlement	1		1							
False pretense	2	2						1	1	
Forgery	5	5								
Grand larceny	32	25	3	2	2					
Injury to animals	1		1							
Manslaughter	11	9		1	1					
Murder	9	7	1	1				3		
Petit larceny	18	15		3						
Placing poison on land of another										4
Practicing medicine without license	2	1		2						
Presenting firearms	1	1		1				1		1
Public drunkenness	1			1						
Punch boards	15	10		5						10
Rape	1									
Receiving stolen property	3	3	1							
Reckless driving	19	15	1	2	1			2	2	11

Removing property under lien	4	2				2		
Robbery	5	4				4		
Shooting into dwelling	1				1			
Trespass	2				1			
Violating prohibition law	27	11	2		2		3	8
TOTALS	350	217	14		82	37	118	43

CIRCUIT COURT OF DEKALB COUNTY

[illegible]

CIRCUIT COURT OF DEKALB COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Signing false certif. of election	10				10					
Transporting	9	8			1		7			1
TOTALS	151	37	12	98	4		32	1		4

CIRCUIT COURT OF ELMORE COUNTY

Abusive language	1									
Adultery	3				1					
Arson	4	2			3					
Assault and battery	15	11			4		2	1		10
Assault to murder	15	7	2		6		4	3		
Assault with weapon	1	1								1
Assault to rape	1	1					1			
Assault to ravish	1	1						1		
Bastardy	4	1								1
Burglary	3	2	1		3		2			
Burglary and grand larceny	23	22			1		21	1		
Carrying concealed weapon	6	2	1		2		1	1		1

[illegible]

CIRCUIT COURT OF ESCAMBIA COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Abusive language	9	4	1	4				2		2
Arson	1		1							
Assault and battery	11	4	1	6				2		2
Assault to murder	2				1					
Assault with weapon	3	1		2				1		
Assault to ravish	2	2					2			
Burglary	4	2		1	1		2			
Carnal knowledge	1	1					1			
Carrying concealed weapon	1	1	1							
Distilling	1	1					1			
Driving while intoxicated	3		2		1					
False pretense	1			1						
Forgery	10	5			5		4		1	
Grand larceny	15	8	1	1	5		8	3		
Hoboing	3	3								
Injury to animal	1	1								1
Injury to building	1	1						1		
Manslaughter	1	1					1			
Murder	6	5	1				5			
Petit larceny	7	4								4
Public drunkenness	5	2	1	2					1	1
Receiving stolen property	1	1		3			1			
Reckless driving	2	2								
Removing property covered by lien	1			1						2

[illegible]

CIRCUIT COURT OF ETOWAH COUNTY

Abusive language	12	7	1	3	1				2	5
Adultery	5	2		5						
Arson	39	18	4	15	2		2		5	6
Assault and battery	38	1	7	24	6				1	7
Assault to murder	1	1							1	
Assault to rape	4	3			1			1		2
Assault to rob	1									
Bad check	1				1					
Bastardy	7	1		4	2					1
Bigamy	3	2			1			2		
Burglary	46	25	8	11	2		25		1	
Carnal knowledge	8	1	1	6						
Carrying concealed weapon	2		1	1						
Decoying child	1			1						
Defamation	1			1						
Distilling	11	9	2					5		4
Disturbing worship	3	3								3

CIRCUIT COURT OF ETOWAH COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Driving while intoxicated	15	6	2	7	—	—	—	—	—	6
Embezzlement	2	1	—	1	—	—	1	—	—	—
False pretense	16	4	2	9	1	—	2	—	—	2
Forgery	6	3	1	1	1	—	3	—	—	—
Grand larceny	58	29	4	20	5	—	28	1	—	—
Incest	1	1	—	—	—	—	1	—	—	—
Injury to animal	2	2	—	—	—	—	—	—	—	2
Lottery	6	6	—	—	—	—	—	—	—	6
Manslaughter	14	9	3	1	1	—	8	1	—	—
Murder	18	10	2	6	—	2	8	—	—	—
Non - Support	2	1	—	1	—	—	—	—	—	1
Operating gambling device	121	105	5	9	2	—	—	8	—	97
petit larceny	29	18	1	6	4	—	—	12	—	6
Public drunkenness	1	1	—	—	—	—	—	—	—	1
Rape	4	1	—	2	1	—	1	—	—	—
Reckless driving	7	3	—	4	—	—	—	—	—	3
Robbery	13	2	4	7	—	—	2	—	—	—
Seduction	2	—	—	2	—	—	—	—	—	—
Selling mortgaged property	4	2	—	2	—	—	—	2	—	—
Throwing into dwelling	2	1	1	—	—	—	—	—	—	1
Trespass	4	—	—	4	—	—	—	—	—	—
Vagrancy	3	3	—	—	—	—	—	—	—	3
Violating game law	2	—	—	2	—	—	—	—	—	—
Violating highway law	4	1	—	3	—	—	—	—	—	1

[illegible]

CIRCUIT COURT OF FAYETTE COUNTY

[illegible]

CIRCUIT COURT OF FAYETTE COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Times Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Violating carrier law	4	2		2						2
Violating game law	5		2	3						
Violating prohibition law	20	10	4	6			1	2		7
TOTALS	70	37	8	24	1		12	7		18

CIRCUIT COURT OF FRANKLIN COUNTY

Assault to murder	15	12	3				4	5		3
Bastardy	2	2								2
Burglary	1	1					1			
Burglary and grand larceny	5	4		1			3	1		
Defaulting witness	3			3						
Distilling	10	7		3			4			3
Embezzlement	1	1								1
False pretense	4	1	2	1						1
Forfeiture	7	7								7
Forgery	10	2		1	7		1	1		1
Grand larceny	10	7		3			6			1

[illegible]

CIRCUIT COURT OF GENEVA COUNTY

[illegible]

CIRCUIT COURT OF GREENE COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Arson	1		1							
Assault and battery	63	56	1	6				5		51
Assault to murder	9	3	2	4			3			
Attempt to distill	40	39	1							39
Burglary	8	7		1			7			
Carrying concealed weapon	33	27	1	5				10		17
Decoying child	1			1						
Disposing mortgaged property	2			2						
Distilling	16	10	1	5			10			
Driving while intoxicated	3	3						2		1
Driving without license	1			1						
Escape	4	3		1				2		1
False pretense	4	3		1				2		
Forgery	1	1					1			
Grand larceny	29	22	3	4			22			
Indecent exposure of person	1	1								1
Malicious mischief	1		1							
Manslaughter	2	2					2			
Murder	7	7					5	2		
Perjury	1	1					1			
Petit larceny	12	10		2				7		3
Reckless driving	1	1								1
Vagrancy	1			1						

Violating prohibition law	29	27	1	1	5	22
TOTALS	270	223	12	35	52	136

CIRCUIT COURT OF HALE COUNTY

[illegible]

CIRCUIT COURT OF HALE COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Transporting liquor	1	1					1			
Vagrancy	1			1						
Violating prohibition law	19	12	1	6				8	4	
TOTALS	150	110	4	30	6		61	30	5	14

CIRCUIT COURT OF HENRY COUNTY

Abusive language	4	2	1	1						2
Assault and battery	8	7	1					2		5
Assault to murder	13	10		2	1		3	5		2
Burglary	3	2		1			2			
False pretense	1			1						
Forgery	1		1							
Grand larceny	10	8	1	1			7	1		
Larceny	2	1		1				1		
Manslaughter	1	1								
Murder	8	4	4				3			1
Petit larceny	5	4		1				1		3

[illegible]

CIRCUIT COURT OF HOUSTON COUNTY

Abusive language	5	1		4			1	
Arson	2		1	1				
Assault and battery	36	23	3	10			9	
Assault to murder	29	20	2	7			6	
Assault to rob	1			1				
Attempt to commit arson	1	1					1	
Bad check	1	1					1	
Bastardy	1		1					
Burglary	21	16	1	4			16	
Carnal knowledge	3	1	1	1			1	
Carrying concealed weapon	1	1						
Disposing mortgaged property	2	1	1				1	
Distilling	3	3						
Driving while intoxicated	1	1					3	
Embezzlement	1			1				
False pretense	2	2						
Forgery	9	7		2			2	
Grand larceny	21	18	2	1			7	
Murder	12	9	2	1			18	
Perjury	1			1			8	
Petit larceny	10	9		1			1	
							7	

[illegible]

CIRCUIT COURT OF JEFFERSON COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to			
						Death	Penitentiary	Hard Labor	Jail
Abusive language	8	1	1	6				1	
Adultery	2			2					
Affray	3	1		2				1	
Aiding prisoner to escape	1	1						1	
Arson	8	6	1	1			6		
Assault and battery	120	61	14	44	1			45	16
Assault to murder	64	32	7	23	2		30	2	
Assault to rape	2	1		1			1		
Assault to ravish	4	2	2				1	1	
Assault to rob	7	3		4			2	1	
Attempt to commit a felony	20	7	3	10				4	3
Attempt to distill	1	1					1		
Bad check	23	14		9				13	1
Bastardy	36	11	6	18	1			11	
Bigamy	2	1		1			1		
Blackmail	1	1						1	
Breach of the peace	3	1	1	1					1
Burglary	300	258	11	31			235	23	
Burglary and grand larceny	119	81	9	29			64	17	
Carnal knowledge	2		2						
Carrying concealed weapon	8	3		5				3	
Concealing stolen property	27	14	1	12			6	7	1
Contributing to delinquency of child	13	4	1	8				2	2
Defamation	1			1					

Disposing mortgaged property	3	2	1	1	2
Distilling	195	167	10	14	4
Driving while intoxicated	36	24	4	8	13
Embezzlement	26	14	4	4	11
False pretense	61	11	1	49	8
Forgery	140	103	2	35	60
Grand larceny	417	317	20	79	207
Incest	3	1	1	1	110
Leaving scene of accident	1	1	1	1	1
Loitering	1	1	1	1	1
Malicious mischief	6	2	1	3	2
Manslaughter	53	33	7	13	19
Mayhem	3	2	1	1	4
Murder	134	89	27	18	8
Non-support	28	14	3	11	1
Perjury	5	5	5	5	13
Petit larceny	59	44	2	13	35
Possession of burglary tools	1	1	1	1	3
Public drunkenness	12	4	1	7	1
Rape	9	2	4	2	4
Reckless driving	22	5	4	11	2
Resisting officer	5	2	2	2	2
Robbery	144	100	13	29	100
Setting off dynamite	7	7	7	7	1
Sodomy	1	1	1	1	1
Trespass	4	4	4	4	1
Unlawful assembly	4	4	4	4	1
Vagrancy	71	26	3	41	17
Violating cosmology act	70	1	1	69	2
Violating game law	2	2	2	2	2
Violating highway law	6	4	4	2	2
Violating lottery law	37	18	6	13	16
Violating narcotic act	7	5	2	2	2
Violating plumbing law	1	1	1	1	2
Violating prohibition law	433	104	33	293	39
					65

CIRCUIT COURT OF JEFFERSON COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Violating revenue law	21	1								1
Violating stock law	2	1		20						1
Violating Sunday law	16		16	1						
TOTALS	2821	1602	223	977	19	1	972	487	11	131

CIRCUIT COURT OF LAMAR COUNTY

Abusive language	9	2	1	6						2
Assault and battery	6	3	3							3
Assault to murder	3	2		1				1		1
Bastardy	3	2		1				2		
Burglary	3	3					3			
Carnal knowledge	1		1							
Defacing public building	1	1								1
Distilling	21	11	5	5			10			1
Disturbing worship	1	1							1	
Driving while intoxicated	1	1								1
Forgery	4	4					4			

[illegible]

CIRCUIT COURT OF LAUDERDALE COUNTY

Arson	3	3				3			
Assault to murder	6	5	1						2
Assault with weapon	3	3							2
Bastardy	3	3							
Burglary	24	23	1						
Carnal knowledge	1	1							1
Distilling	6	4	2						
Embezzlement	2	1		1					1
Forgery	18	18							
Grand larceny	22	19	2	1					2
Leaving scene of accident	2	2							
Manslaughter	8	7	1						2
Miscegenation	2	2							
Murder	11	7	4						
Possession of counterfeit stamp	2	2							2

CIRCUIT COURT OF LAUDERDALE COUNTY--(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Receiving stolen property	1	1					1			
Robbery	2	2					2			
Seduction	1	1					1			
Transporting liquor	3	3								3
TOTALS	120	106	12	2		3	88	8		7

CIRCUIT COURT OF LAWRENCE COUNTY

Aiding prisoner to escape	1									
Arson	3	3					3			
Assault to murder	3	3					3			
Attempt to distill	1	1					1			
Burglary	2	1	1				1			
Distilling	10	6		4			6			
False pretense	1		1							
Grand larceny	9	8		1			8			
Manslaughter	1		1							
Murder	1	1					1			

[illegible]

CIRCUIT COURT OF LEE COUNTY

Arson	2					2			
Assault to murder	12	8			3	1	6	2	
Assault to rob	1	1					1		
Assault with weapon	3	3						1	
Bastardy	1				1				
Bigamy	1				1				
Burglary	27	19	1		2	5	19		
Burglary and grand larceny	14	14					14		
Carnal knowledge	1		1						
Carrying pistol without license	1	1			1			1	
Concealing stolen property	1								
Distilling	21	13			7	1	13		
Disposing mortg. property	1				1				
Driving while intoxicated	1	1						1	
Forgery	3	3							
Grand larceny	34	24	3		6	1	24		
Manslaughter	3	3					2		1
Murder	6	2	2		2		2		
Petit larceny	4	4						3	1
Presenting firearms	2				2				
Public drunkenness	1	1						1	
Rape	2	1	1						
Robbery	1	1					1		

CIRCUIT COURT OF LEE COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Seduction	1			1						
Transporting liquor	2			2						
Violating prohibition law	7	4		3						4
TOTALS	153	103	8	32	10		86	9	1	7

CIRCUIT COURT OF LIMESTONE COUNTY

Abusive language	4			3	1					
Arson	1	1					1			
Assault and battery	8	6	1		1					6
Assault to murder	11		2	9						
Assault with weapon	6	5		1				2		3
Attempt to commit felony	1	1								1
Attempt to commit forgery	1	1								1
Attempt to distill	1	1								1
Bastardy	1				1					
Bigamy	1				1					
Burglary	25	18	2	5			18			

[illegible]

CIRCUIT COURT OF LOWNDES COUNTY

[illegible]

CIRCUIT COURT OF LOWNEDES COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Attempt to murder	1	1					1			
Bastardy	2	1		1						1
Burglary	12	10	2				10			
Burglary and grand larceny	4	4					4			
Carrying concealed weapon	4		1	3						
Distilling	1			1						
Grand larceny	12	8	1	3			8			
Hunting without license	1				1					
Injury to building	1			1						
Manslaughter	7	7					7			
Murder	12	7	2	2	1		7	3		1
Petit larceny	4	4					4			
Robbery	5	4		1						
Shooting into dwelling	1	1								1
TOTALS	78	54	8	14	2		44	6		4

CIRCUIT COURT OF MACON COUNTY

Arson	1	1					1			
Assault to murder	7	5		2			4			1

[illegible]

CIRCUIT COURT OF MADISON COUNTY

Adultery	4	1	1	2				1	
Affray	1			1					
Arson	4	2			2		2		
Assault	10	3		7				3	
Assault and battery	22	9	2	10	1			4	1
Assault to murder	23	6	2	13	2		5	1	
Assault to ravish	2			1	1				
Assault to rob	1			1					
Assault with weapon	20	7	5	5	3		1	2	
Attempt to distill	3	3							
Bad check	3				3				
Bigamy	1			1					

CIRCUIT COURT OF MADISON COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Burglary	33	16	3	11	3		16			
Burglary and grand larceny	24	12	3	8	1		12			
Carrying concealed weapon	12	6	6	5	1			1	1	4
Concealing stolen property	7	2		5			1	1	1	
Defacing building	1	1								
Defective car	6	2		4						2
Disposing mortgaged property	2	1		1			1			
Distilling	5	4		1			4			
Disturbing worship	6		1	2	3					
Driving while intoxicated	40	18	12	10				10	2	6
False pretense	2	1	1				1			
Forgery	13	4	1	5	3		2		1	1
Gaming	19	5		3	11			3		2
Grand larceny	38	14	4	15	5		13	1		
Kidnapping	1	1				1				
Larceny	1		1							
Lottery	3	2		1				2		
Manslaughter	5	3	2				2			1
Murder	22	10	7	5			10			
Non - Support	1	1								
Obscene language	35	14	7	11	3			1		7
Perjury	28	1	1	22	4		1	7		
Petit larceny	43	16	1	17	9			14	1	1
Public drunkenness	84	37	8	37	2			11		26

[illegible]

CIRCUIT COURT OF MARENGO COUNTY

Abusive language	3	3							3
Assault and battery	24	17		7					16
Assault to murder	17	14		3				14	
Attempt to distill	35	33	1	1					33
Burglary	8	8						8	
Carnal knowledge	1		1						
Carrying concealed weapon	5	1	1	3				1	
Distilling	13	12		1				12	

CIRCUIT COURT OF MARENGO COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequies	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Disturbing worship	2	1	—	—	1	—	—	—	—	1
Grand larceny	37	29	3	—	5	—	29	—	—	—
Manslaughter	4	4	—	—	—	—	2	1	—	1
Murder	11	11	—	—	—	1	10	—	—	—
Operating slot machine	3	1	—	—	2	—	—	—	—	1
Petit larceny	4	4	—	—	—	—	—	—	—	4
Rape	6	—	6	—	—	—	—	—	—	—
Violating license law	2	—	2	—	—	—	—	—	—	—
Violating prohibition law	37	24	2	—	11	—	—	1	—	23
TOTALS	212	162	16	34	—	1	75	4	—	82

CIRCUIT COURT OF MARION COUNTY

Abusive language	3	1	1	1	—	—	—	—	—	1
Adultery	1	—	1	—	—	—	—	—	—	—
Arson	1	—	—	1	—	—	—	—	—	—
Assault and battery	5	2	1	1	—	—	—	—	—	2
Attempt to distill	2	2	—	—	1	—	—	1	—	1

[illegible]

CIRCUIT COURT OF MARSHALL COUNTY

Abusive language	19	2	1	16			2
Adultery	1			1			1
Assault and battery	16	4		12			4
Assault to murder	17	2	2	13			2
Assault to ravish	2	1		1			1

CIRCUIT COURT OF MARSHALL COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Assault with weapon	4	1	1	2						1
Attempt to rob	1			1						1
Bad check	3	1		2						1
Bastardy	6	3		3						3
Bigamy	1			1						
Borrowing funds of bank by officer	1	1					1			
Burglary	4	1		3			1			
Burglary and grand larceny	1			1						
Carnal knowledge	3	1		2				1		
Carrying concealed weapon	1			1						
Concealing stolen property	1			1						
Decoying child	3			3						
Desertion	4	1		3						1
Disposing mortgaged property	1			1						
Distilling	11	3		8			3			
Disturbing worship	6			6						
Driving while intoxicated	13	6	1	6						6
Driving without license	1			1						
Embezzlement	5	1		4			1			
Failing to send child to school	1	1								1
False pretense	6	2		4						2
Forgery	4			4						
Grand larceny	18	3	1	14			3			
Incest	1			1						

Leaving scene of accident	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
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CIRCUIT COURT OF MOBILE COUNTY

Abusive language	3	1						1
Adultery	2		2					
Affray	10	2		8				2
Arson	1		1					
Assault	13	6	1	5	1			1
Assault and battery	55	29	1	14	11			1
								26
								5
								2

CIRCUIT COURT OF MOBILE COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Assault to murder	27	14	1	7	5		13		1	
Assault to rape	6	3	1		2		3			
Assault to rob	4	3	1				3			
Assault with weapon	33	21		6	6			2	16	3
Attempt to commit arson	2	2							2	
Attempt to commit burglary	8	8						1	7	
Attempt to commit larceny	2	1		1					1	
Bad check	10	1		5	4				1	
Bastardy	9		2	4	3					
Burglary	133	114	2		17		108		6	
Burglary and grand larceny	7	6	1				5		1	
Carnal knowledge	3		2	1						
Carrying concealed weapon	12	4	1	4	3				4	
Carrying pistol without license	1				1					
Conspiracy	1			1						
Contempt of court	1	1							1	
Crime against nature	1			1						
Driving while intoxicated	52	18	4	10	20				18	
Embezzlement	5	2			3		1		1	
Failure to keep proper reports	12			1	11					
False pretense	12	5		7					4	
Forgery	11	6		4			6			
Grand larceny	98	68	8	7	15		64		4	
Injury to animal	6	3		2	1					3

Injury to property	7	5	2	2	1	5
Leaving scene of accident	9	4	3	3	1	3
Malicious mischief	1		1			
Manslaughter	11	7	1	1	5	2
Mayhem	1					
Murder	30	19	6	2	15	
Operating slot machine	1					
Perjury	3		2	1		
Petit larceny	41	32	1	7	4	28
Presenting firearms	3	1	2			1
Public drunkenness	6	5	1			5
Rape	4	2			2	
Receiving stolen property	27	16	1	10	5	11
Reckless driving	19	3	13	3		3
Robbery	22	12	4	6	12	
Threats	4	3		1		3
Trespass	3		1	1		
Using auto without owner's consent	3	2				2
Vagrancy	20	18	1	1		18
Violating barber law	16	3	11	2		3
Violating fish law	8	1	5	2		1
Violating gasoline law	3		1	2		
Violating oyster law	3	1		2		1
Violating pistol law	2		2			
Violating prohibition law	187	19	8	142	18	19
Violating rented motor vehicle law	1	1				1
Violating Section 3186 of code	1			1		
Violating Section 3339 of code	1	1				1
Violating Section 3448 of code	2	2				2
Violating Section 4908 of code	1			1		
Violating Section 4925 of code	2			2		
Violating State oil and grease law	1			1		
TOTALS	983	475	55	287	166	205
					4	9
					244	13

CIRCUIT COURT OF MONROE COUNTY

CHARACTER OF OFFENSE

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Abusive language	3	1			1			1		
Aiding prisoner to escape	1	1					1			
Arson	2	2					2			
Assault and battery	19	14	1		4			8		6
Assault to murder	2	2					2			
Assault to rape	1	1					1			
Assault to rob	3	3					3			
Bad check	2	1						1		
Burglary	6	3			1		3			
Carnal knowledge	1	1			1		1			
Carrying concealed weapon	3	2						2		
Distilling	2		1							
Disturbing worship	1				1					
Driving while intoxicated	1									
False pretense	3	2			1		1			1
Forgery	4	2			2		2			
Gaming	3				3					
Grand larceny	10	6			2		6			
Leaving scene of accident	1	1								1
Manslaughter	3	3					3			
Murder	6	6					6			
Perjury	3	1					1			
Petit larceny	10	9			1			5		4
Possession of still	1	1			1		1			

Public drunkenness	2	1	1				
Receiving stolen property	1	1		1			
Reckless driving	3	1	2				
Temporary use of auto	1	1			1		
Transporting liquor	2		2				
Trespass	3		3				
Violating game law	3	1	2				
Violating prohibition law	22	14	2		8		
Violating stock law	2		2				
Violating Sunday law	6	4	1		3		
TOTALS	136	84	6	38	8	34	29
							21

CIRCUIT COURT OF MONTGOMERY COUNTY

Assault and battery	32	31	1				9
Assault to murder	38	18	8	12			
Assault to rape	3	3			18		
Assault to ravish	1		1		3		
Assault to rob	3	3					
Assault with weapon	3	3					
Attempt to burglarize	2	2					
Attempt to commit grand larceny	1	1					
Bad check	1			1			
Burglary	64	48	4	12	48		
Carnal knowledge	2	2			2		
Carrying concealed weapon	10	6		4			
Contributing to delinquency	1	1					
Crime against nature	1			1			
Cruelty to animals	1	1					
Distilling	12	9	1	2	9		1
Driving while intoxicated	5	4		1			2

CIRCUIT COURT OF MONTGOMERY COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequites	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Embezzlement	13	5	1	7			5			
False pretense	5			5						
Forgery	13	11		2			11			
Grand larceny	369	303	15	51			303			
Manslaughter	9	9					9			
Miscegenation	3	2		1			2			
Murder	31	20	7	2	2	2	18			
Non-Support	3			3						
Practicing embalming without license	1	1								1
Petit larceny	22	18	1	3				10		8
Presenting firearms	3	2		1				1		1
Public drunkenness	1	1								1
Rape	6	3	1	2			3			
Receiving stolen property	10	7	1	2			7			
Removing fixtures from building	1	1					1			
Removing mortgaged property	4	4					4			
Robbery	30	14	7	8	1		14			
Speeding	1	1						1		
Transporting liquor	3	3					3			
Using property without owner's consent	2	2						2		
Vagrancy	4	2		2				1		1
Violating carrier law	1			1						
Violating highway law	1			1						

Violating prohibition law	5	2	3						
TOTALS	721	543	48	127	3	2	463	52	26

CIRCUIT COURT OF MORGAN COUNTY

[illegible]

CIRCUIT COURT OF MORGAN COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Seduction	5	1			4		1			
Selling mortgaged property	3	1			2		1			
Transporting liquor	2				2					
TOTALS	205	115	19	64	7	2	102	3		8

CIRCUIT COURT OF PERRY COUNTY

Assault and battery	5	3		2						3
Assault to murder	15	1	1	10	3					1
Assault to ravish	1	1					1			
Assault with weapon	8	7		1						7
Bad check	1			1						
Burglary	17	8	1	6	2					
Burglary and grand larceny	10		1	8	1		8			
Carrying concealed weapon	5	2			3					2
Carrying pistol without license	5	2	1	2						2
Distilling	4	4								4
Disturbing public assembly	2	1		1						1

[illegible]

CIRCUIT COURT OF PICKENS COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Abusive language	1	1			1					
Arson	1	1					1			8
Assault and battery	11	8								
Assault to murder	2		1		3					
Attempt to distill	21	21			1					21
Burglary	1	1					1			
Distilling	9	9					3			6
Driving while intoxicated	1	1						1		
Embezzlement	1									
False pretense	1		1		1					
Forgery	3			3						
Manslaughter	3	2	1				2			
Murder	2	1	1				1			
Reckless driving	1			1						
Trespass	1			1						
Violating prohibition law	12	6	4	2				3		3
TOTALS	71	50	8	13			8	4		38

CIRCUIT COURT OF PIKE COUNTY

[illegible]

CIRCUIT COURT OF PIKE COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Transporting liquor	3	2	1				2			
Violating prohibition law	12	8	2	1	1			3		3
Violating revenue law	1	1								1
TOTALS	158	107	15	27	9	1	75	13	3	15

CIRCUIT COURT OF RANDOLPH COUNTY

Abusive language	2				2					
Aiding prisoner to escape	1				1					
Assault and battery	2	1			1			1		
Assault to murder	2				2					
Assault with weapon	1	1								1
Bastardy	4		1		3					
Bigamy	1	1					1			
Burglary	3	3					3			
Burglary and grand larceny	8	5			3		5			
Carnal knowledge	1				1					
Carrying concealed weapon	1				1					

	17	2	1	14	2		
Distilling	17	2	1	14			
False pretense	2		1	1			
Forfeiture	1	1					
Forgery	2	2			2		1
Grand larceny	12	8	2	2	8		
Manslaughter	4	4			4		
Obstructing public road	1			1			
Petit larceny	5	1	1	3		1	
Possession of still	3	1		2		1	
Presenting firearms	1			1			
Public drunkenness	3			2	1		
Receiving stolen property	2			2			
Robbery	3	2		1	2		
Selling mortgaged property	1			1			
Vagrancy	1		1				
Violating prohibition law	9	5	3	1		2	3
TOTALS	93	37	10	45	1	27	5

CIRCUIT COURT OF RUSSELL COUNTY

Abandonment	4	2		2		1	1
Abusive language	4	2	1	1			2
Arson	4	3		1			
Assault and battery	25	21	2	2		3	5
Assault to murder	22	13	2	7		13	16
Assault to rob	1	1				1	
Attempt to burglarize	1	1					1
Bad check	4	2		2			2
Bastardy	1		1				

CIRCUIT COURT OF RUSSELL COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequites	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Burglary	25	19	5	1			19			
Burglary and grand larceny	9	6	1	2			6			
Buying stolen property	1	1								1
Carnal knowledge	7	3	3	1			3			
Carrying concealed weapon	4	2	1	1						2
Concealing stolen property	7	3	1	3			3			
Crime against nature	1	1					1			
Disposing mortgaged property	2	1		1			1			
Distilling	37	36	1				36	1		3
Driving while intoxicated	5	4		1						
Embezzlement	3			3						1
False pretense	1	1								
Forgery	3	1	1	1			1			
Gaming	1			1						
Grand larceny	29	21	4	4			20			1
Hunting without license	1	1								1
Lottery	1	1								1
Maintaining liquor nuisance	1			1						
Malicious injury	1			1						
Manslaughter	2	1		1			1			
Mayhem	1	1					1			
Murder	10	8	2			3	5			8
Petit larceny	15	10	4	1				2		

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CIRCUIT COURT OF ST. CLAIR COUNTY

Abortion	1					1			
Arson	1	1						1	
Assault and battery	3	1	2					1	
Assault to murder	5	1	2			2			1
Assault with weapon	1					1			
Burglary	8	5	1			1		5	
Burglary and grand larceny	1					1			
Conspiracy	1					1			
Defective car	1						1		
Distilling	3	2				1		2	
Driving while intoxicated	1	1							1

CIRCUIT COURT OF ST. CLAIR COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Grand larceny	2	1					1			
Manslaughter	2	2			1		2			
Murder	16	4	1				4			
Operating gambling device	13	13								13
Possession of still	1		1							
Possessing firearms	1									
Public drunkenness	1			1						
Robbery	5	3	1				3			
Seduction	1			1						
Selling mortgaged property	1			1						
Trespass	1		1							
Vagrancy	1									
Violating prohibition law	15	6	9							6
TOTALS	86	40	18	23	5		19			21

CIRCUIT COURT OF SHELBY COUNTY

Abusive language	2	2								2
Aiding prisoner to escape	1	1					1			

Assault and battery	9	8	1						3	5
Assault to murder	7	5	1	1						
Assault with weapon	9	5	1	3					3	
Attempt to distill	36	36								
Bad check	2			1	1					
Bastardy	3	2		1						
Bigamy	1	1								2
Burglary	6	4	1					1		
Carrying concealed weapon	1		1					4		
Concealing stolen property	2		1							
Defamation	1	1	1					1		1
Distilling	119	98	6	13	2			98		
Disturbing worship	1	1							1	
Driving while intoxicated	5	3		2					1	1
Forgery	1	1						1		
Grand Larceny	7	6			1			6		
Manslaughter	4	4						4		
Murder	5	5						5		
Petit larceny	4	4							1	3
Possession of still	1	1						1		
Possessing firearms	2	2						2		
Public drunkenness	5	2		3					1	1
Reckless driving	2	1	1							1
Robbery	3	3						3		
Seduction	1			1						
Transporting liquor	1		1							
Trespass	2	2								
Violating game law	1		1							2
Violating prohibition law	9	5	1	3						3
TOTALS	253	204	14	31	4			132	12	59

CIRCUIT COURT OF SUMTER COUNTY

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to			
						Death	Penitentiary	Hard Labor	Jail
Abusive language	1				1				
Assault and battery	14	12	2					1	
Assault on murder	13	7	5	1			7		
Attempt to distill	7	7							
Burglary	20	16		4			16		
Carnal knowledge	1	1					1		
Carrying concealed weapon	9	3			1				
Distilling	3	2		1			2		
Grand larceny	25	18	4	3			18		
Injury to animal	1		1						
Injury to building	4			4					
Manslaughter	3	2		1			2		
Murder	9	7	2			1	6		
Operating gambling device	1	1							1
Petit larceny	3	2		1					2
Public drunkenness	1			1					
Reckless driving	1		1						
Violating prohibition law	11	4	4	2	1			1	
									3
TOTALS	127	82	19	24	2	1	52	2	27

CIRCUIT COURT OF TALLAPOOSA COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Assault	2				2					
Assault and battery	9	1	1	2	5					1
Assault to murder	17	3	1	4	9		3			
Assault to rape	1	1					1			
Assault to ravish	1	1					1			
Assault with weapon	2	2					1			2
Attempt to murder	5	1		4			1			
Bastardy	5				5					
Blackmail	1	1					1			
Burglary	7	4	1		2		4			
Burglary and grand larceny	7	5		2			5			
Carnal knowledge	2				2					
Concealing stolen property	2						2			
Distilling	28	19	3	4	2		19			
Driving while intoxicated	2	1		1			1			1
Embezzlement	1	1								
Forgery	5	4			1		1			4
Grand larceny	19	5		5	9		5			
Manslaughter	2	2					2			
Murder	9	3	4	1	1		2			1
Profane language	3				3					
Reckless driving	3	1		2				1		
Robbery	3		1	1	1					

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CIRCUIT COURT OF TUSCALOOSA COUNTY

Abusive language	6	3				3			3
Adultery	4	2				2			
Aiding prisoner to escape	1	1						1	
Arson	1					1			
Assault	3	2				1			1
Assault and battery	26	20				1			12
Assault to murder	13	5				8			5
Assault to rape	1	1							1
Assault to rob	3	3							3
Assault with weapon	34	25				8	1		16
Attempt to distill	23	22				1			5
Attempt to transport whiskey	5	5							1
Bastardy	2					1			
Betting at gaming table	3	3							
Bigamy	1					1			
Burglary	30	24				2	3		
Burglary and grand larceny	20	15				1	3		24
Carnal knowledge	1	1							15
Carrying concealed weapon	3	1				2			1
Concealing stolen property	1					1			
Conducting a lottery	1	1							1

CIRCUIT COURT OF TUSCALOOSA COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Prosequites	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Decoying child	1				1					
Disposing mortgaged property	2				2					
Distilling	7	4			3		4			
Driving with improper tag	1	1								1
Driving while intoxicated	4	3						3		
Driving without license	1	1			1			1		
Embezzlement	7	2		2	3		2			
Failure to send child to school	1									
False pretense	8	3			1		3			
Forgery	7	7			4		6	1		
Gambling	2	2						2		
Grand larceny	65	41	5		18		41			
Injury to animal	5	2								2
Leaving scene of accident	5	4	1		3		1	3		
Loitering	1	1						1		
Injury to property	2	2						1		
Manslaughter	5	5						1		1
Manufacturing counterfeit revenue stamps	2	1						1		1
Murder	14	6	4		1		4			
Non-Support	3							6		
Operating gambling device	10	8	1		2					8
Petit larceny	52	47	1		3			29		18
Presenting firearms	3				3					

Public drunkenness	47	44	3	17	27
Reckless driving	23	19	1	10	9
Robbery	12	7	1	7	
Speeding	8	7	1	4	3
Trespass	8	4	1	3	1
Vagrancy	20	15	5	11	4
Violating fish law	4	1	3		1
Violating game law	8	8			
Violating highway law	1	1		1	
Violating prohibition law	105	43	1	24	19
TOTALS	626	415	30	125	139

CIRCUIT COURT OF WALKER COUNTY

Abusive language	20	7	4	9	2	3
Adultery	3	2		1	1	1
Affray	1					
Arson	4	2		2		
Assault and battery	50	31	2	15	2	18
Assault to murder	11	4	3	4		
Assault with weapon	4	2		2	1	1
Attempt to burglarize	1	1			1	
Attempt to distill	12	12				12
Attempt to rob	3	2			2	
Bastardy	3			3		
Blackmail	1	1			1	
Carnal knowledge	2	1		1		
Carrying concealed weapon	5	3		1	1	1
Concealing stolen property	4	2		2	2	

CIRCUIT COURT OF WALKER COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to			
						Death	Penitentiary	Hard Labor	Jail
Contempt of court	2	1		1					1
Defamation	1	1						1	
Distilling	6	6					6		
Disturbing worship	2			2					
Driving while intoxicated	27	12	5	10				4	1
False pretense	2	1		1					1
Forgery	6	3		3	1		1		2
Gaming	5	1	1	3					1
Grand larceny	35	28	2	5			9	19	
Incest	1			1					
Injury to animal	3	2		1				2	
Injury to property	4	3	1						1
Lo tery	3		2						
Manslaughter	6	4		1			1	3	
Murder	8	5	1	2			5		
Non-support	14	3	3	8				1	
Petit larceny	31	22	2	7				4	11
Presenting firearms	3	1	1	1					7
Public drunkenness	24	10	4	10				4	1
Reckless driving	13	5	4	4				2	6
Robbery	6	6					6		3
Seduction	1								
Selling insurance without license	1	1		1					1

Selling mortgaged property	1	1							1	
Shooting into dwelling	1	1							1	
Sending threatening letter	1	1							1	
Vagrancy	4	2			1				1	1
Violating game law	2				1					
Violating prohibition law	114	27			14	65	8		10	
Violating stock law	5					5				17
TOTALS	456	217	51	176	12	39	65	28	85	

CIRCUIT COURT OF WASHINGTON COUNTY

[illegible]

CIRCUIT COURT OF WASHINGTON COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Murder	7	5	1	1			5			
Permitting sheep-killing dog to run at large	1			1						
Petit larceny	12	8		3	1				3	5
Possession of still	3				3					
Reckless driving	1			1						
Removing boundary mark	1		1							
Shooting into dwelling	2	1	1		1					
Trespass	2			2						
Unlawful assembly	1			1						
Violating election laws	2		2							
Violating game law	9	2	3	4						2
Violating hog law	2			1	1					
Violating prohibition law	5		1	4						
TOTALS	119	37	19	50	13		16	1	3	17

CIRCUIT COURT OF WILCOX COUNTY

Abusive language	1				1					
Arson	2	2					2			

[illegible]

CIRCUIT COURT OF WINSTON COUNTY

[illegible]

CIRCUIT COURT OF WINSTON COUNTY—(Continued)

CHARACTER OF OFFENSE	No. of Cases Disposed of	Convictions	Acquittals	Nolle Proseques	Abated or Withdrawn	Number of Sentences to				Fines Paid or Secured
						Death	Penitentiary	Hard Labor	Jail	
Arson	2			2						
Assault and battery	19	12	1	6			1	1		10
Assault to murder	5	3	1	1			3			
Attempt to distill	20	20						2		18
Bastardy	4		1	3						
Bigamy	2			2						
Burglary	3			3						
Carnal knowledge	1			1						
Distilling	12	6	4	1	1		2			4
Destroying lien	1	1	1							
Disturbing worship	1	1						1		
Driving while intoxicated	3	1		2						1
Embezzlement	1	1		1						
Forfeiture	4	4								4
Forgery	1	1		1						
Grand larceny	11	3		7	1		3			
Injury to public property	1	1								1
Manslaughter	2	2					1	1		
Murder	1	1	1							
Petit larceny	24	13	4	7				1	12	
Placing obstruction on railroad	1	1					1			
Presenting firearms	1	1	1							
Public drunkenness	17	12	2	2	1					12

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